JUL 19 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF MARTIN DRAIN AND BRANCHES DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

Petitioners,

vs.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, A PUBLIC QUASI CORPORATION OF MACOMB COUNTY, MICHIGAN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RAYMOND J. DYKEMA,
DAVID M. WOOD,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Opinions below	2
Basis of jurisdiction	2
Summary statement	2
Questions presented	8
Reasons relied upon for allowance of writ	9
Brief in support of petition	14
Opinions below	14
Jurisdiction	14
Statement of the case	15
Specification of errors	15
Argument	15
1. Denial of due process by holding bondholders barred from all remedies on their bonds by decrees in taxpayers' suits	16
2. Circuit Court of Appeals did not decide issues in acordance with local law	22
Rejection by Court of Appeals of local interpretations of drain statute as to character of improvement drain commissioner was authorized to construct	23
Rejection by Court of Appeals of local authorities as to the effect of bond recitals	25
Error of Court of Appeals in holding duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed	34
Error of Court of Appeals in ignoring effect of statute prohibiting collateral attack on the drain proceedings	36
Error of Court of Appeals in failing to award bondholders money in the bond redemption fund	41

Page

3. Error of Circuit Court of Appeals in refusing to restrain use of taxpayers' decree to impede tax collections 42
Conclusion 43
Appendix following page 44 1

TABLE OF CASES CITED.

American Surety Co. v. *Baldwin*, 287 U. S. 156 ... 23
Baker, et al., v. *Ruddiman Valley No. 3 Drain District* (unreported) 10, 30
Bates v. *City of Hastings*, 145 Mich. 574 ..... 10, 27
Bernards Twp. v. *Morrison*, 133 U. S. 523 33
Brooks v. *Oakland County*, 268 Mich 637 ..... 11, 41
Chase National Bank v. *City of Norwalk*, 291 U. S. 431 ..... 9, 12, 15, 19, 42
Chelsea Savings Bank v. *Ironwood*, 130 Fed. 410 ... 41
Chemical Bank & Trust Co. v. *County of Oakland*, 246 Mich. 673 33
City of Akron v. *Barber Asphalt Co.*, 171 Fed. 29 .. 41
City of Defiance v. *Schmidt*, 123 Fed. 1 ..... 32, 33
Coler v. *Dwight School Twp.*, 3 N. Dak. 249 28
Common Council v. *Schlich*, 81 Mich. 405 ..... 10, 27
Cummings v. *Garner*, 213 Mich. 408 40
Detroit v. *Township of Redford*, 253 Mich. 453 21
Detroit Fire and Marine Insurance Co. v. *Oakland County*, 284 Mich. 130 .....
Detroit Trust Co. v. *Dingman*, 291 Mich. 170 ..... 7, 10, 23
Dixon County v. *Field*, 111 U. S. 83 33
Douglas v. *Pike County*, 101 U. S. 677 37
Donohue v. *Russell*, 264 Mich. 217 ..... 11, 37
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64 22
Fetzer v. *Johnson*, 15 F. (2d) 145 ..... 9, 12, 42
First Wisconsin National Bank v. *Bessemer Twp.*, 286 Mich. 426 33
Florida R. R. Co. v. *Shutte*, 103 U. S. 118 18
Godkin v. *Rutterbush*, 147 Mich. 116 20
Gray v. *Dingman*, 279 Mich. 62 40
Great Northern Railroad Co. v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 37
Hackett v. *Ottawa*, 99 U. S. 86 ..... 27, 32
Hansberry v. *Lee*, 311 U. S. 32 ..... 10, 14, 17
Heliker v. *Oakland County*, 216 Mich. 593 40

Page

Jacobson v. *Miller*, 41 Mich. 90 19
Kent v. *Dana*, 100 Fed. 56 28
Kennedy v. *Dingman*, 272 Mich. 24 ..... 10, 23
Kersh Lake Drainage District v. *Johnson*, 309 U. S. 485 ..... 20, 21
Kinner v. *Spencer*, 257 Mich. 142 19
Koen v. *Beardsley*, 63 Fed. (2) 595 31
Leroy v. *Collins*, 165 Mich. 380 19
David A. Manville & Co. v. *Frances Oil & Refining Co.*, 20 Fed. (2) 473 31
Meyering Land Co. v. *Spencer*, 273 Mich. 703 37
Moore v. *Nampa*, 276 U. S. 536 32
National Life Insurance Co. v. *Board of Education*, 62 Fed. 778 28
New England Mutual Life Ins. Co. v. *Mitchell*, 118 Fed. (2) 414 22
Northern National Bank of Toledo v. *Porter Twp.*, 110 U. S. 608 32
Pittsburgh, etc. Iron Co. v. *L. S. Iron Co.*, 118 Mich. 109 ..... 11, 37
Portsmouth Savings Bank v. *Ashley*, 91 Mich. 670 ..... 33, 34
Riggs v. *Johnston County*, 6 Wall. 166 43
Risley v. *Howell*, 64 Fed. 463 28
Royal Oak Drain District v. *Keefe*, 87 F. (2d) 786, 6, 19, 23, 32
Schmid v. *Village of Frankfort*, 131 Mich. 197 ..... 10, 27
Smith v. *Carlow*, 114 Mich. 67 23
Southern Railway Co. v. *Walters*, 284 U. S. 190 14
Spitzer v. *Village of Blanchard*, 82 Mich. 234 33
State of Minnesota v. *National Tea Co.*, 309 U. S. 551 18
State Tax Commission v. *Van Cott*, 306 U. S. 511 18
Stellwagen v. *Dingman*, 229 Mich. 159 ..... 11, 39
Stringfellow v. *Atlantic Coast Line R. R. Co.*, 290 U. S. 322 14
Taylor v. *Ypsilanti*, 105 U. S. 60 37
Thompson v. *Village of Mecosta*, 127 Mich. 522 ..... 10, 27, 32
Thompson v. *Emmett Irrigation District*, 227 Fed. 560 41
Twp. of Clarence v. *Dickinson*, 151 Mich. 270 ..... 11, 38, 39
Twp. of Lake v. *Millar*, 257 Mich. 135 ..... 24, 37
Twp. of Norton v. *Cockerill*, 265 Mich. 405 ..... 11, 31, 41
Twp. of Swan Creek v. *Brown*, 130 Mich. 382 23

Page

Twp. of Warren v. *Engelbrecht*, 251 Mich. 608 40
Union Pacific R. R. Co. v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160 18
U. S. v. *Council of Keokuk*, 6 Wall. 514 43
Vandenbark v. *Owens Illinois Glass Co.*, 311 U. S. 635, 61 S. Ct. 347 25
Vickery v. *Sioux City*, 104 Fed. 164 41
Village of Clawson v. *Van Wagoner*, 268 Mich. 148 25
Villlage of Oak Park v. *Van Wagoner*, 271 Mich. 450 ..... 12, 23
Waite v. *Santa Cruz*, 89 Fed. 619 28
Welch v. *City of Lincoln Park*, 268 Mich. 440 19
West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179 ..... 15, 30
Western & A. R. R. v. *Henderson*, 279 U. S. 639 14
William Lane Inc. v. *Selby Shoe Co.*, 45 Fed. (2) 581 31
Willis v. *Board of Commissioners*, 86 Fed. 872 41
Wuchter v. *Pizzutti*, 276 U. S. 13 ..... 14, 21

STATUTES AND AUTHORITIES CITED

A.L.R. Volume 9, p. 856 40
Volume 86, p. 1086 27
Constitution of the State of Michigan, Art. VIII, Sec. 15a 3
Constitution of the United States:
Fifth Amendment 8, 16, 17
Fourteenth Amendment 16
Corpus Juris, Volume 44, p. 1253, Art. 425 27
Dillon, Municipal Corporations, 5th Ed. Art. 952 26
Judicial Code, Section 24 (28 U.S.C. 41) 14
Section 240a (28 U.S.C. 347) 14
Michigan Compiled Laws, 1929, Sec. 4902 11
1929, Sec. 4927 11
1929, Sec. 4938 11
Michigan Drain Law, Chap. VI, Sec. 11 10
Chap. X, Sec. 5 11
Sec. 15 3
Sec. 16 11
Michigan Public Acts, 1923, Ch. 10, Sec. 14, Act 316 10
1927, Act 331 ..... 11, 20, 35
McQuillan, Municipal Corporations, Vol. 6 (Revised), Art. 2497, 2502 27
R.C.L. Volume 19, p. 1018, Art. 311 27

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL AND PELHAM C. WILMERDING, ON BEHALF OF THEMSELVES AND ALL OTHER OWNERS AND HOLDERS OF BONDS OF MARTIN DRAIN AND BRANCHES DRAIN DISTRICT OF MACOMB COUNTY, MICHIGAN,

Petitioners (Appellees Below),

vs.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, A PUBLIC QUASI CORPORATION OF MACOMB COUNTY, MICHIGAN; COUNTY OF MACOMB; CARL B. BRANDENBURG, COUNTY TREASURER; GUY L. BROWN, COUNTY CLERK; BERT ENGELBRECHT, DRAIN COMMISSIONER; SHERWOOD BENNETT, CONTROLLER; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF ERIN; TOWNSHIP OF LAKE; TOWNSHIP OF WARREN; AND ROY F. STOCKWELL, TOWNSHIP TREASURER OF LAKE TOWNSHIP,

Respondents (Appellants Below).

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Ap-

peals for the Sixth Circuit entered March 14, 1941, reversing a judgment of the District Court of the United States for the Southern District of Michigan entered September 15, 1939.

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record.)

Opinions Below.

The opinion of the District Court (168) confirms a master's report (98). The opinion of the Circuit of Appeals (643) was rendered March 14, 1941.

Basis of Jurisdiction.

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938.

Judgment of the Circuit Court of Appeals was entered March 14, 1941. Petition for rehearing was filed April 9, 1941 (657), and denied May 9, 1941 (672), without opinion. Issuance of mandate was stayed by order of that court dated May 15, 1941, for thirty days, pending the application for writ of certiorari in this court.

Summary Statement.

The suit in general involves the question of the right of petitioners, and others of the class for whom suit was brought, to enforce an issue of bonds, of which $1,193,000.00 are still outstanding, issued by the Martin Drain and Branches Drain District of Macomb County, Michigan.

In Michigan, drain proceedings are conducted by a County officer, the Drain Commissioner, under authority of a law from which we have copied applicable provisions in the appendix (p. 1). The proceedings are instituted by a petition of land owners for the creation of a taxing district,

followed by a petition for the location and establishment of a drain within the district. A finding of necessity must be made by an independent tribunal convened by the County Probate Court. Assessments to defray construction costs are levied against lands in the district, and may also be levied against the state, county and townships for benefits to roads and other public property. Such assessments may be divided into annual installments, and bonds may be issued in anticipation of the collection thereof. Authority is given to drain districts to issue bonds by Article VIII, Section 15(a) of the State Constitution, which provides: "Any drainage district established under provisions of law may issue bonds for drainage purposes within such district," and by Section 15, Chapter X, of the Drain Law (p. 11 Appendix). Taxes are collected, and if delinquent, enforced as general property taxes through the regular collection and enforcement agencies. Notice by publication, and in some instances personal service, is given of each important step in the proceedings. A review of any question involving any step in the proceedings is provided by certiorari, which must be taken within ten days after the final order of determination, the last step in the proceedings except the issuance of bonds, letting of contracts and confirmation of assessment roll. An appeal from assessment may also be taken within ten days after confirmation of the roll. Except for certiorari and appeal, the statute forbids any other attack on the proceedings, the legality of the drain, or taxes levied therefor. As taxes are collected they are placed in a bond redemption fund in the County treasury, and can be used only to service the bonds. Under some conditions the County is obliged to advance moneys to the redemption fund in case of deficiency, to be reimbursed by later collections of drain taxes. If the amount originally levied is insufficient to pay the cost of the drain and bonds that have been issued, an additional levy is re-

quired. No prescribed form of drain is required, nor is it restricted to storm water. Cities, villages and townships may use it for sewage disposal, and sewage disposal and purification plants may be built in connection with it.

The bonds in question were issued in proceedings strictly conforming to the Drain Law (624), and were sold by the district to an investment house at par and accrued interest (638). The investment house almost immediately resold them to the public. With the money received the officers built the drain, which now has been in use for over twelve years. Until June 1, 1931, maturing interest has been met, and $190,000.00 principal amount of bonds of the district paid. Tax collections were made and a substantial surplus in the bond redemption fund accumulated. In December, 1931, County officers suspended interest payments, and the following year suspended tax collections. Objection to payment of the bonds and levy of taxes is based upon the claim that the improvement was designed and built with the intention that it should serve the dual purpose of removing surface water and sanitary sewage, and that because of this underlying purpose the Drain Commissioner lacked jurisdiction. The proceedings, however, disclosed no purpose other than drainage, and the improvement contains no appurtenances or features intended for sanitary sewerage (384). It is an underground conduit with numerous inlets for the reception of surface water, and of sufficient capacity to transport surface water in times of heavy storms.

The bonds contain recitals (22) that they were issued for the building of the named drain, compliance with the drainage laws specified, and the due happening, existence and performance of all conditions precedent to make them legal and binding obligations.

Petitioners filed their bill (1) in the District Court, alleging the following: Facts necessary to confer jurisdiction on the District Court by reason of diverse citizenship, the

proceedings for the building of the drain, the issuance and good faith purchase of the bonds, default and refusal to pay, and refusal to levy taxes. Foundation for an injunction to restrain the diversion of the drain fund was laid by allegations that various taxpayers had sued either to get possession of the fund, or to restrain the levy of further taxes against them or their lands. It appeared from this that in one suit commenced by Erin Township August 22, 1932, a decree had been entered September 16, 1932, against the County of Macomb, its Board of Supervisors, Drain Commissioner and Treasurer, restraining them from levying any taxes against the Township. The decree appears as an exhibit to the bill (27). The only reason appearing for the entry of decree, so far as the record shows, is that the Macomb County Circuit Court accepted the Township's claim that the taxes were void because the drain was not an open ditch (13). Neither pleadings nor opinion of the State Court in the Township's case appear elsewhere in the record. The relief prayed by bondholders in this case was a decree establishing the bonds as valid obligations, mandatory injunction compelling the levy of taxes, maintenance of sinking funds, restoration of diverted moneys, accounting and payment of bonds from sinking fund or the County's general fund. The bill also asked that the Township of Erin be restrained from using the decree it had obtained to impede the collection of taxes. Respondents' answers consist of a denial of the validity of the bonds and taxes on the ground that the improvement was not a drain, and assert that by reason of that fact no rights accrued to bondholders.

The District Court made a limited order of reference to the Standing Master in Chancery who determined (81-88)—(a) all bonds were held by *bona fide* holders for value or by those succeeding to their rights, (b) present holders are entitled to rely on the truth of the recitals in the bonds,

(c) defendants were estopped to deny the truth of the recitals.

While decree for the plaintiffs was being settled in the District Court, the Circuit Court of Appeals decided *Royal Oak Drain District* v. *Keefe*, 87 F. (2d) 786, and the District Court decided that because of a certain statement in the opinion in that case, it would be advisable to refer the case (97) to a Special Master to determine the primary purpose and character of the project and to settle the terms of the decree.

The Master took testimony (201, *et seq.*) in accordance with the previous orders of reference and filed a complete report (98-153). The Master in his report concluded that the improvement was illegal in the light of certain Michigan court decisions, but that inasmuch as the bonds contained recitals importing compliance with the law and proper performance of all conditions precedent, they were valid in the hands of present holders, and that the recitals were valid under Michigan law (134). He held that the State Court decree obtained by Erin Township was not *res judicata* against bondholders, since they were not parties to the record in that case, and under Michigan law which he cited the decree could not operate against them (101). He further held that there was no obligation on bondholders' part to intervene in the taxpayers' suit (102). Exceptions to the report were taken by defendants (154) on the ground that the Master should not have held that the Court had jurisdiction, should not have found that bondholders occupied the position of good faith holders, and should not have applied the estoppel rule. No exception was taken on the ground that he should have held the State Court decrees binding to any extent upon bondholders. Plaintiffs excepted (163) to the finding that the improvement was illegal. The court overruled all exceptions (171) except one relating to the amount of diversion from

the fund, and filed a short opinion declaring his view that the bondholders were entitled to recover because of defendants' estoppel to plead the falsity of the bond recitals (168). A judgment was entered substantially as prayed (172), which declared the bonds valid, directed officers to levy and collect taxes, to maintain sinking funds, directed the County to restore diversions and to advance its general funds for the payment of bonds and interest past due under statutory limitations. It also restrained Erin Township from using the decree obtained in the State Court to prevent officers from making tax levies. The principal defendants then appealed to the Circuit Court of Appeals, which, as noted above, reversed the judgment.

The opinion of the Circuit Court of Appeals (643) agrees with the District Court in its conclusion that it had jurisdiction, that bonds are held *bona fide*, and that the projects are illegal under Michigan law. It refuses to consider a decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170, holding that a Michigan Drain Commissioner has power to build drains for the removal of both storm water and sewage, holds that parties other than the drain districts are not obliged to recognize the bonds as legal, that the districts are not estopped by their bond recitals, and that the decree in the taxpayers' suit is *res judicata* against bondholders. The latter is not stated as an independent ground for reversal, but appears to be interwoven into the court's entire process of reasoning. It is embodied in the question which the court says it has for decision (649), "Whether when the Michigan courts have held that these particular projects and all proceedings thereunder are void, the recitals in the bonds estop appellants, etc." The court had before it another issue which petitioners believe should have been considered in support of the judgment, *i. e.*, the binding effect of the statutory provision forbidding collateral attack on drain

proceedings, which petitioners believe was not considered because of the court's view that the bondholders were barred by a prior adjudication.

Questions Presented by This Petition.

The fundamental questions presented are:

1. Whether due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States has been denied petitioners, and other holders of these bonds, in deciding that a decree in a suit brought by Erin Township, a taxpayer in the drain district, against the Drain Commissioner and others, to which suit no bondholders were parties, was *res judicata* of issues relating to the validity of the bonds and remedies thereon, on the theory that the Drain Commissioner represented bondholders, so that all matters decided in such prior suit, or which might have been decided therein, were adjudications against bondholders.

2. Whether in applying the law of the State of Michigan a Federal Court is not bound by the entire body of such law contained in the statutes and court decisions, under such rules of interpretation and construction as the Court of last resort of the State would be obliged to follow. Subsidiary to this question are the following:

(a) Whether when the State Court of last resort has by its last decision declared the powers of drain districts to build drainage improvements of a particular character, the Federal Courts can reject such decision on the ground that it involved a different drainage improvement.

(b) Whether when a State Court of last resort has rendered decisions holding that a municipal corporation is estopped against *bona fide* holders of its bonds to plead that the bonds are issued for a purpose different than that which is recited in the bonds, such deci-

sions can be rejected in the absence of a clear showing that such decisions have been overruled.

(c) Whether public officers and other public bodies charged with the duty of performing acts necessary to provide funds for the payment of municipal bonds are excused from performing such acts when liability of the issuing municipality rests upon estoppel.

(d) Whether when a State statute provides that there may be no collateral attack on proceedings for the construction of a drain, and decisions in force when bonds for such drain were issued interpret such statute to forbid collateral attack except where proceedings violate the Constitution, such decisions can be rejected, it being the law of the State that rights which accrue under a statute as judicially interpreted must be judged in accordance with the same interpretation.

(e) Whether when the State law provides that moneys collected from drain taxpayers shall be used only for the purpose of paying bonds, and denies the right of taxpayers to recover the same, the money so collected and in the possession of the county as statutory custodian of the fund can be withheld from bondholders.

3. Whether the lower court has not rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Eighth Circuit, in *Fetzer* v. *Johnson*, 15 F. (2d) 145, and in conflict with the decision of this court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431, in refusing to enjoin a party who has obtained a decree or judgment in another court from enforcing it in a manner inimical to the rights of parties not bound thereby.

Reasons Relied Upon for Allowance of Writ.

1. The United States Circuit Court of Appeals, Sixth Circuit, has decided an important question of federal law, probably in conflict with the Fifth Amendment to the Con-

stitution of the United States, and in conflict with the decision of this court in *Hansberry* v. *Lee,* 311 U. S. 32, 61 Sup. Ct. 115.

2. The United States Circuit Court of Appeals, Sixth Circuit has decided important questions of local law, probably in conflict with local statutes and decisions in the following respects:

(a) It has decided that Martin Drain and Branches Drain is an illegal structure, in the absence of any violation of the Drain Law by the officers who designed and built it, and contrary to the interpretations of such law by the local court of last resort in *Kennedy* v. *Dingman,* 272 Mich. 24, and *Detroit Trust Co.* v. *Dingman,* 291 Mich. 170.

(b) It has decided that a municipality which issues its bonds, reciting therein that the same are issued for a purpose which the law authorizes, is not estopped against *bona fide* holders of said bonds to plead the falsity of its recitals, which decision is in conflict with local decisons as follows: *Common Council* v. *Schlich,* 81 Mich. 405; *Thompson* v. *Village of Mecosta,* 127 Mich. 522; *Schmid* v. *Village of Frankfort,* 131 Mich. 197; *Bates* v. *City of Hastings,* 145 Mich. 574, and *Baker, et al.,* v. *Ruddiman* #3 *Drain District, et al.,* unreported decision of United States District Court, Western District of Michigan, Southern Division.

(c) It has decided that public officers charged with the duty of levying and collecting taxes, maintaining sinking funds for the payment of drain district bonds, and the county charged with the duty of making temporary advancement of moneys in case of drain fund deficiencies, are not obliged to perform such duties when the validity of the bonds rests upon the estoppel of drain districts, its decision in this respect being without statutory warrant and contrary to general law.

(d) It has ignored and failed to give effect to Section 11, Chapter VI, of the Drain Law, Act 316, Public Acts

of Michigan of 1923, as amended by Act 331, Public Acts of Michigan of 1927, Section 4902, Michigan Compiled Laws 1929 (see Appendix, p. 8), the material part of which reads as follows: "If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." It has failed to give effect to interpretations of this statute holding that collateral attack on the drain proceedings and taxes therefor is forbidden, contained in *Township of Clarence* v. *Dickinson*, 151 Mich. 270, and *Stellwagen* v. *Dingman*, 229 Mich. 159, and disregarded local decisions holding that judicial interpretations under which rights accrue must continue to be applied to such rights notwithstanding subsequent inconsistent decisions, *i. e.*, *Pittsburgh, etc., Iron Co.* v. *L. S. Iron Co.*, 118 Mich. 109, and *Donohue* v. *Russell*, 264 Mich. 217.

(e) It has ignored and failed to give effect to Section 16, Chapter X, of the Drain Law, Act 316, Michigan Public Acts 1923, as amended by Act 331, Michigan Public Acts 1927, Section 4938, Michigan Compiled Laws 1929, (see Appendix, p. 13), the material part of which reads as follows: "All of said installments (of drain taxes) and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of said drain, to be used solely for the payment of bonds as the same shall mature," and it has failed to give effect to Section 5, Chapter X, of said Drain Law, Act 316, Michigan Public Acts of 1923, Section 4927, Michigan Compiled Laws 1929, (see Appendix, p. 10), the material portion of which reads as follows: "No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty (30) days from the time of payment of such money to, or sale of such property by, the collecting officer," and it has ignored and failed to give effect to the construction of said statute as contained in *Township of Norton* v. *Cockerill*, 265 Mich. 405, *Brooks* v. *Oakland County*, 268 Mich. 637.

3. The United States Court of Appeals, Sixth Circuit, has decided important questions as to powers of Federal Courts to restrain action to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer* v. *Johnson*, 15 F. (2d) 145, and in conflict with the decision of this Court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431.

4. The Supreme Court of Michigan now has before it a case which we believe will determine the view of the State Court as to whether bonds containing similar recitals to those here involved are valid in the hands of good faith holders. City of Highland Park and other holders of bonds of another drain district, Royal Oak No. 7 Storm Sewer Drain District, have petitioned the court to issue a writ of mandamus to compel the Drain Commissioner of Oakland County, Michigan, and the Board of Supervisors of such County, to levy and spread drain taxes for such drain. *City of Highland Park, et al.*, v. *Clark, et al.*, No. 41690, Michigan Supreme Court. Respondents have pleaded that they should not be compelled to do so because, as they allege, the project is a sewer and was so held to be in *Village of Oak Park* v. *Van Wagoner*, 271 Mich. 450. Thus the same issue as was considered by the Circuit Court of Appeals will in all probability be decided within a few months, and will definitely determine the local law on the subject. Petitioners, therefore, believe that if this Court has any hesitancy to issue the writ of certiorari in this case, it should defer action until the State Court of last resort has decided the pending action.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and send to this Court for

its review and determination, as provided by the statutes of the United States, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 8583, Martin Drain and Branches Drain District, et al., Appellants, *v.* Kenneth M. Keefe, et al., Appellees," and that the judgment therein of said Court of Appeals be reversed by this Court, and that your petitioners may have such other and further relief in the premises as to the court may seem just and proper.

Dated: July 19, 1941.

KENNETH M. KEEFE,
ERNEST E. QUANTRELL and
PELHAM C. WILMERDING,
Petitioners.

By DAVID M. WOOD and
RAYMOND J. DYKEMA,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

Opinions of the District Court consist of the two Reports of the Masters in Chancery (81-88; 98-153); opinion of the District Judge (168); opinion of the Circuit Court of Appeals, Sixth Circuit (643), reported 119 F. (2d) 157. No opinion was filed upon denial of petition for rehearing (672).

II.

Jurisdiction.

1. The date of the decree to be reviewed is March 14, 1941 (642); rehearing denied May 9, 1941 (672).

2. This suit was brought to enforce rights of petitioners, and others of a class represented by them, as holders of bonds issued by the drain district described in the foregoing petition. The District Court had jurisdiction by virtue of diversity of citizenship. *Judicial Code*, Sec. 24, U. S. C., Title 28, Sec. 41.

The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240 of the *Judicial Code*, U. S. C., Title 28, Sec. 347.

3. The cases believed to sustain jurisdiction are as follows:

Wuchter v. *Pizzutti*, 276 U. S. 13;
Western & A. R. R. v. *Henderson*, 279 U. S. 639;
Hansberry v. *Lee*, 311 U. S. 32;
Southern Railway Co. v. *Walters*, 284 U. S. 190;
Stringfellow v. *Atlantic Coast Line R. R. Co.*, 290 U. S. 322;

West v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179;

Chase National Bank v. *City of Norwalk*, 291 U. S. 431.

III.

Statement of the Case.

We deem the recital of facts contained in the "Summary Statement of Matters Involved" in the accompanying petition for writ of certiorari, together with the facts recited in the Master's reports (81 and 98), a sufficient statement to serve this Court in its consideration of this brief. Same are hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The errors in the decision of the Circuit Court of Appeals which are relied upon by petitioners in this case are set out in the statement of "Reasons Relied upon for the Allowance of Writ" in the accompanying petition for writ of certiorari (p. 9, *supra*). Petitioners will rely upon and urge before this Court all errors therein assigned. Same are hereby adopted and made a part of this brief.

V.

ARGUMENT.

Summary and Introductory Matters.

Since this is a class suit, we will refer to petitioners, and others in the class represented by them, as bondholders. We follow the grouping of questions involved, and reasons relied upon for allowance of writ of certiorari, but condense them to the following points:

1. Due process is denied petitioners by holding them barred from all remedies on their bonds by decrees in taxpayers' suits.

2. Lower court did not decide issues in accordance with local law.

(a) It rejected local interpretations of the drain statute in relation to the kind and character of drains which a Drain Commissioner is authorized to build.

(b) It rejected local authorities as to the effect of bond recitals.

(c) It held duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.

(d) It ignored the effect of statutes prohibiting collateral attack on the drain proceedings.

(e) It ignored the effect of local statutes and general law, in failing to award bondholders money in the bond redemption funds.

3. Lower court held it could not restrain use of taxpayers' decree to impede collection of taxes.

Recognizing that this Court must be convinced of the importance of the questions to be decided, as well as the lower court's error in deciding them, we shall discuss under each main point reasons which we think justify this Court in taking jurisdiction.

1. Denial of due process by holding bondholders barred from all remedies on their bonds by decrees in taxpayers' suits.

Courts, as well as other governmental agencies, must observe rules designed to afford due process, and this Court has no higher or more important duty to perform that that of enforcing the Fifth and Fourteenth Amendments. It has done so frequently where comparatively small

amounts are involved. In this case a large amount is involved, and the decision will directly affect a large number of persons.

Courts seldom deliberately disregard the obligation to afford due process. When they do so it is the result of errors in reasoning on some other matter. A frequent cause of this error lies in erroneous application of settled rules as to *res judicata*. Recently this Court was called upon, in *Hansberry* v. *Lee*, 311 U. S. 32, to reverse a State Court because of its erroneous application of such rules. This Court there said:

> "But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes."

Undoubtedly the same statement would apply when judgments of lower Federal Courts are considered in connection with the Fifth Amendment. There is also considerable similarity between the *Hansberry* case and this in regard to the issues involved. There it was claimed that a former judgment was binding upon a litigant on the theory of representation by one of a class; here it is claimed on the theory of representation by a public officer.

We anticipate that respondents will say that this question need not be considered because the lower court might have reached the same conclusion without holding that the former decree was a binding adjudication, but we think such argument untenable in view of the language of the lower court's opinion. The principal question which the lower court declared was presented (649) included the fact of the decrees of the State Circuit Court in taxpayers' cases. Lastly,

it expressly says (655), "Those cases are res judicata as to the determinative facts of this controversy." The argument thus presented in the lower court's opinion shows that the factor pertaining to the effect of the taxpayers' decrees is so interwoven in the court's reasoning as to prevent the assumption that the court would have reached the same conclusion without it. See *State Tax Commission* v. *Van Cott*, 306 U. S. 511; *State of Minnesota* v. *National Tea Co.*, 309 U. S. 551. The principle is also well established that where an opinion gives two grounds for a conclusion, neither can be treated as *obiter* and disregarded by inferior courts. *Florida R. R. Co.* v. *Shutte*, 103 U. S. 118; *Union Pacific R. R. Co.* v. *Mason City & Fort Dodge R. R. Co.*, 199 U. S. 160. Unless this decision is reversed, it will require all District Courts in the Sixth Circuit to hold that decrees in taxpayers' suits against the validity of proceedings under which bonds are issued are binding adjudications against bondholders, even though they are strangers to the case in which the decree is rendered. We assume that this court, in the exercise of its supervisory jurisdiction, would prefer to correct the error now, if it is an error, before it becomes a rule of decision for courts in this circuit.

While the lower court says that petitioners are bound by a decree of the Circuit Court of Macomb County, Michigan, (23) in a suit by the Township of Erin holding assessments for drain taxes to be illegal and void, the court did not have before it any of the pleadings in any of the State Court cases set forth in the bill of complaint (13). From the one decree in the record and allegations concerning it in the pleadings, it is plain that this was an ordinary taxpayers' suit to relieve the Township from a tax against it. Relief was not prayed against bondholders, and no bondholders were named as parties or served with process. The record contains neither allegation nor proof that any bondholder knew that such suit had been commenced, and the brief time

during which it was pending, from August 22 to September 16 of 1932, would have prevented this knowledge reaching them. We believe it firmly established by this court that even if they had known that such a suit was instituted, they were not obliged to intervene therein, for the court said, in reversing the same Court of Appeals (*Chase National Bank* v. *City of Norwalk*, 291 U. S. 431 (441)):

> "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. * * * Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights."

While the District Court regarded this pronouncement as binding upon it, apparently the Court of Appeals disagrees with it, for in the course of its opinion (656) it indicated that petitioners should have intervened in the suits which resulted in the decrees.

The Court of Appeals' reasoning that the decree obtained by Erin Township was an adjudication against bondholders is difficult to account for on any known principle of law. Such decree amounts only to a declaration that taxes against Erin Township are invalid. It neither adjudicates the invalidity of taxes against other lands and municipalities, and lands of individual owners, nor the invalidity of bonds. The lower court ignores the principle which it formerly recognized in *Royal Oak Drain District* v. *Keefe*, 87 Fed. (2d) 786, that under the law of Michigan, courts are without jurisdiction in suits *in personam* to make decrees binding upon strangers, (*Kinner* v. *Spencer*, 257 Mich. 142; *Welch* v. *City of Lincoln Park*, 268 Mich. 440), and that no decree or judgment can be *res judicata* in another suit unless there be identity of issues and parties. *Leroy* v. *Collins*, 165 Mich. 380; *Jacobson* v. *Miller*, 41 Mich. 90. As we understand its views, they rest upon (1) Sec. 14, Ch.

10, Act 316, Michigan Public Acts 1923, providing that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the Drain Commissioner shall be joined as a party; (2) *Godkin* v. *Rutterbush*, 147 Mich. 116, a decision which ordered a suit dismissed where a taxpayer sought to recover a tax paid under protest, but neglected to join the Drain Commissioner, in which decision the court expressed its opinion that the Legislature passed the statute because the Commissioner in a peculiar sense stands as the representative of those who are interested in the drain and in the collection of the tax; and (3) *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485.

The first two grounds appear untenable under Michigan law, for as noted above, *Kinner* v. *Spencer* (*supra*), unqualifiedly denied the power of the court to grant any relief against bondholders, though it set aside taxes levied for a drain in a suit to which the Drain Commissioner was a party. The bill there prayed for an injunction against payment of the bonds, but the court refused such relief, saying: "None of the holders of such bonds were made parties to the suit." If the novel interpretation now placed by the lower court on this statute had appealed to the Michigan court, it is reasonable to suppose that it would have granted such relief. We submit, however, that the Court of Appeals virtually assumed legislative powers over the State of Michigan by placing an interpretation upon the statute which would make it confer a representative capacity upon the Drain Commissioner, and thus make any decree against him operate as a decree against all bondholders. The statutory provision is clear and explicit and requires no interpretation, and the court, in *Godkin* v. *Rutterbush* (*supra*), did not pretend to interpret it. Its explanation of reasons which it supposed prompted the Legislature to pass the law cannot be considered an interpretation, for the case called

for no enlargement of the express language of the Legislature. In Michigan, as elsewhere, the courts follow the rules set forth in *Detroit* v. *Township of Redford*, 253 Mich. 453, 455; (1) if the wording of a statute is unambiguous there is no room for construction; (2) the terms of a statute cannot be extended by construction beyond the obvious import of its language.

If the statute had expressly provided what the lower court has read into it, it would be invalid, (*Wuchter* v. *Pizzutti*, 276 U. S. 13) for one may not be made another's statutory representative for any purposes of a law suit unless provision is made for notifying the absent party.

We submit that the lower court has been misled in its interpretation of *Kersh Lake Drainage District* v. *Johnson*, 309 U. S. 485, and has extended it far beyond the intent of this court. This court there was reviewing a judgment of the Supreme Court of Arkansas and was, of course, bound by its interpretation of State law. It was attempting no independent interpretation of the State law and had no jurisdiction to do so. Its sole province was to determine whether the judgment of the State Court violated Federal law. Here there is no decision of a Michigan court which ascribes such representative capacity as the lower court has given to the Drain Commissioner, but on the contrary, the fair inference is that the State Court has expressly declined to bind bondholders on any theory of representation by the Drain Commissioner. *Kinner* v. *Spencer* (*supra*). In the *Kersh Lake* case there had been a prior adjudication of the same cause of action between identical parties in the State Court, and the only question before the Supreme Court was whether the ordinary rules as to *res judicata* must yield, where it appeared that the party previously defeated was bringing the second suit in order to obtain funds to pay over to creditors. Here the opinion nullifies well estab-

lished rules, which deny binding effect to a judgment between other parties on a different cause of action.

While the courts recognize that situations may occur where a party may stand in judgment for another, as in class suits, the rule of virtual representation is never applied unless it appears that the alleged representative necessarily and probably possessed the same interests as the absent party. The doctrine of virtual representation can never apply where their interests are adverse. *Hansberry* v. *Lee* (*supra*). The interests of bondholders and the Drain Commissioner here were certainly adverse, for in the case commenced by bondholders in the Federal Court the same Commissioner whom the lower court supposed was the bondholders' representative pleaded and did his best to prove that bondholders had no rights.

2. Circuit Court of Appeals did not decide issues in accordance with local law.

We presume that all will agree with the statement in *New England Mutual Life Insurance Co.* v. *Mitchell,* 118 Fed. (2d) 414: "The respectful attitude toward the local court, where there has been no decision on the precise question before us, is to consider the question in the light of the common law of the state, with a view to reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it." The entire body of state law, both in statutes and court decisions, must be considered in the light of the customary rules of interpretation prevailing in the State. It is important that Federal Courts adhere to this principle, otherwise they are giving merely lip service to the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The principal legal issues considered in this section of our brief are all now before the Supreme Court of Michigan in a mandamus proceeding entitled "City of Highland Park,

et al, v. Clark, et al," No. 41690. In this suit relators seek to compel the levy and spread of taxes to pay bonds issued for the construction of a project considered in *Village of Oak Park* v. *Van Wagoner*, 271 Mich. 450, one of the Michigan authorities cited by the Circuit Court of Appeals. Respondents contend that they should not be compelled to take this action, advancing the same arguments used by the Court of Appeals in its decision. We believe that this fact should be called to this Court's attention, as it is likely that it would prefer to postpone action on the petition until the Michigan Court has decided the *City of Highland Park* case. This would accord with procedure in *American Surety Company* v. *Baldwin*, 287 U. S. 156, see note p. 163.

(a) *Rejection by Court of Appeals of local interpretations of Drain Statute as to character of improvement Drain Commissioner was authorized to construct.*

The Michigan statute relating to drains contains no restrictions as to the form they shall take; their location, depth, capacity, methods and materials of construction are within the Commissioner's discretion. *Smith* v. *Carlow*, 114 Mich. 67; *Township of Swan Creek* v. *Brown*, 130 Mich. 382. The statute, as noted above, (Appendix, p.—) specifically authorizes their use for the removal of sewage, and the construction of sewage disposal plants as part of the drain project. The structure under consideration serves all drainage requirements, and contains no feature, appurtenance, or capacity for any contemplated sewage flow (240), but like any other channel or water course, sewage can be transported in it. On no reasonable basis can it be distinguished from the drains held legal in *Royal Oak Drain District* v. *Keefe*, 87 Fed. (2d) 786; *Kennedy* v. *Dingman*, 272 Mich. 24; and *Detroit Trust Co.* v. *Dingman*, 291 Mich. 170.

The Circuit Court of Appeals in its opinion (643) says this drain has been held to be predominantly a sewer in the *Township of Erin* case in the Circuit Court of Macomb County, but it has no support for that statement. The only word of the local court on the subject is the decree (23), which merely declares the proceedings void as to the Township, without stating any grounds therefor. There is no other local decision relating to this drain; hence there is no authoritative consideration of the subject by any local court. The Master concluded it was a sewer because it was like the Nine Mile-Halfway Drain, and because it had been included in a Master Plan for drainage and sewerage improvements in the southern part of Macomb County. Neither of these grounds is related to any conclusion of Michigan courts on the subject of the distinction between a drain and sewer. While *Township of Lake* v. *Millar*, 257 Mich. 135, related to the Nine Mile-Halfway Drain, which the Master said was similar in design, the court there was not called upon and did not pass upon the legality of the structure. It merely assumed that it was a sewer, and considered other questions raised. The so-called Master Plan was a preliminary engineering study which the Drain Commissioner had caused to be prepared, showing how existing and projected drains could be planned to give the maximum service in removing storm water and sewage. It was no part of the proceedings for this drain (624), and entirely immaterial. At the time the Martin Drain bonds were issued, there was no way in which bondholders could know that the Drain Commissioner had such a plan, unless they visited his office and inquired as to the meaning of a map which he had hung in his office (130).

The Federal Courts cannot say that this structure is illegal without pointing to some feature which makes it illegal. The presumption that the Drain Commissioner acted lawfully in designing it requires the court to regard

it as a legal structure until the contrary is proved. *Village of Clawson* v. *Van Wagoner,* 268 Mich. 148. The last decision of the Michigan Supreme Court, *Detroit Trust Co.* v. *Dingman* (*supra*), though relating to another drain, interpreted the Michigan Drain Law in its relation to the kind of drainage improvement which should be declared legal. It there quoted the provision authorizing the building of sewage disposal plants, and said because of this provision, "It conclusively appears the Legislature contemplated drains might be constructed for the purpose and with the intent that they should serve also as a means of disposing of ordinary sewage." The Circuit Court of Appeals could not disregard this decision and still decide the case according to Michigan law. The fact that the *Detroit Trust Company* case was decided while this case was pending on appeal did not excuse the Court of Appeals from applying it. *Vandenbark* v. *Owens Illinois Glass Co.,* 311 U. S. 635, 61 S. Ct. 347.

(b) *Rejection by Court of Appeals of local authorities as to the effect of bond recitals.*

An important question of public and commercial law is here involved. We think that the Court of Appeals has departed from a long line of decisions, particularly of this Court, and the courts of Michigan, in permitting these drain districts to gain an advantage by misrepresentations in their bonds. Hitherto the rule has always prevailed that a public corporation, like private corporations and individuals, is estopped from pleading its own wrong. It is a safe and salutary rule, beneficial both to investors and the public, for the certainty of its enforcement has in the long run enabled honest public corporations to borrow money for needed improvements, and to extend payment on their obligations, at low cost to their taxpayers. This decision, if followed, must ultimately drive investors to other forms of security involving less risk.

The rule which has long prevailed is accurately stated in *Dillon on Municipal Corporations* (5th Ed.), Art. 952, as follows:

> "The purchaser (of a municipal bond) is bound to see that there exists legislative power, that is a valid legislative act not in conflict with the state constitution for the issue of bonds, or commercial securities of the municipal, public or quasi corporation, and is bound to notice the contents and recitals in the instrument; but if such bonds are duly executed by the proper officers, and if these officers are by the true construction of the legislative enactment in that regard, invested with the power to decide whether conditions precedent have been performed, and the bonds contain a recital that such conditions have been complied with, or a recital which implies such compliance whether the preliminary conditions consist of facts *in pais* or facts of record—the issue of the bonds under such circumstances, with such a recital, is conclusive against the municipality (if the legislature has not otherwise provided) as to the fact or facts recited or implied in the recital, and estops it in an action by an innocent holder for value, before due, to show the contrary."

A vast amount of decisions in the Federal Courts, and all states of the Union, support this rule. It is applied without limitation to cases of this kind,—i. e., where municipalities have by recitals in their bonds expressly or impliedly represented that they are issued for a lawful purpose, but after their issue attempt repudiation on the ground that their own representation was false and that the real purpose was unlawful. This precisely is the claim of the districts, their taxpayers and other defendants. They say that the bonds were not issued for a drain, as they represent on their face, but for a sewer. To prove this they point to facts either in the design for the project, or in the motives of those who participated in the proceedings, and thus contradict their recitals of the due happening and perform-

ance of all required conditions precedent and full compliance with the law.

The opinion suggests that this recital is not of a fact, but of a condition of law, but we think that position is untenable. When one represents that he has complied with the law and that there is no condition, thing, or event which would render his act illegal, he necessarily is representing facts, not law. The party to whom the representation is made is not interested in an interpretation of the law, but in assurance that everything has been done, and nothing omitted, from which a claim of noncompliance could arise.

Recitals such as these in bonds *bona fide* held have uniformly been held to create an estoppel against pleading and proof of an actual unlawful purpose. *McQuillan, Municipal Corporations*, Vol. 6 (Revised), Art. 2497, 2502; 19 R. C. L. p. 1018, Art. 311; 44 C. J. p. 1253, Art. 425; 86 A. L. R. p. 1086. The leading case, *Hackett* v. *Ottawa*, 99 U. S. 86, is clearly reasoned and has never been disputed by the court of any jurisdiction. In Michigan the doctrine is announced in four decisions, never overruled or questioned. *Common Council* v. *Schlich*, 81 Mich. 405; *Thompson* v. *Village of Mecosta*, 127 Mich. 522; *Schmid* v. *Village of Frankfort*, 131 Mich. 197, and *Bates* v. *City of Hastings*, 145 Mich. 574.

In the *Schlich* case, the recital was compliance with a law authorizing bonds to provide funds for public improvements, but the real purpose was to grant aid to a railroad. In a summary of the arguments preceding the opinion, we see that the village contended for the same propositions asserted by the Court of Appeals, but the Michigan court overruled them, saying:

> "If defendant Schlich was a bona fide purchaser without notice of the real object for which these bonds were issued, the village is bound to pay them. This is the only question that can be involved in a suit brought

> to recover upon these bonds; for they would be void in the hands of those who knew the history of the transaction and the purpose for which they were issued."

The Court of Appeals made no reference to this decision.

In *Thompson* v. *Village of Mecosta* (*supra*), the bonds recited compliance with a similar statute, but actually they were issued to induce an owner of a grist mill to locate it in the village. The Michigan court answered the contention of the village that the bonds were void no matter in whose hands, because emanating from an ultra vires act, saying:

> "Was the bond void in the hands of a bona fide holder? This bond purports to have been issued under authority of a law which it mentions, and for the purpose prescribed by the act—a thing that the Village might lawfuly do. As a matter of fact it was not issued for such a purpose, but for a private improvement, and upon its face it unquestionably carried a false pretense; but a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act for lawful purpose, i. e., public improvements."

To show its complete adherence to the rule estopping the municipality to plead an unlawful purpose inconsistent with the recital, the court cites the leading authorities then in existence, among others the following: *Hackett* v. *Ottawa* (*supra*); *Risley* v. *Howell*, 64 Fed. 453; *Kent* v. *Dana*, 100 Fed. 56; *National Life Insurance Co.* v. *Board of Education*, 62 Fed. 778; *Coler* v. *Dwight School Twp.*, 3 N. Dak. 249; *Waite* v. *Santa Cruz*, 89 Fed. 619 (afterwards affirmed in 184 U. S. 302).

In *Schmid* v. *Village of Frankfort* (*supra*), under like circumstances the Michigan court, reversing a judgment for the village, said:

> "It is admitted that the bonds were illegal and void, because they were delivered to one Seeley in pursuance

> of a contract to aid a private enterprise, if they were delivered at all. At the same time they were valid upon their face, reciting that they were made and issued for a lawful purpose (p. 198). * * * Undoubtedly, if the purchasers had been aware of the resolution under which these bonds were issued, it would have been notice of their invalidity; but the evidence indicated that they had no such notice, and that they relied upon the recitals in the bonds, and an accompanying letter from the prosecuting attorney that the proceedings were, upon their face, valid, as to the vote of the electors to issue park bonds. We have held in several cases that one relying upon the recitals in a bond that it was lawfully issued may be a purchaser in good faith."

In *Bates* v. *City of Hastings* (*supra*), suit was instituted by a taxpayer to restrain the city from issuing bonds, alleging that its purpose was to use the proceeds to pay factory bonuses. The Michigan Supreme Court adopted a circuit judge's opinion, in which he said (582):

> "It may be presumed that the bonds which the bill alleges are about to be issued by the proper city authorities, will be valid on their face and may be disposed of to innocent purchasers. Such bonds in the hands of innocent holders, without notice, are collectible and the city must pay them (citing the Schlich, Thompson and Schmid cases, supra)."

The Court of Appeals also made no reference to this decision. It did, however, refer to the *Thompson* and *Schmid* cases, but said that they should be disregarded because "the villages themselves took part in a false recital, contrary to facts later sought to be asserted." With utmost respect to the Court of Appeals, we submit that this is an untenable distinction. It is novel because nowhere in the decisions does the Michigan court express this as a ground for its conclusion, and we think it wholly meaningless. The

representation was that of the village itself, just as here the representation is that of the drain district. There is no way in which an artificial body can make any recital or representation, or do any other act except through agents. It is not a question of participation, but one of actual responsibility as principal for the act of authorized agents.

The Court of Appeals says that it is the law of Michigan that where the projects are illegal from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders. It cites no authority for this strange doctrine, for there is none. No Michigan decision has so held, and it is unreasonable to expect that any should, for it would be contrary to the decisions above quoted. In each of those cases the projects were as illegal as any that could be imagined. Neither the villages nor their officials were acting within any authority or jurisdiction in the project in which they were actually engaged. Public credit was being used in aid of private parties. Projects were being financed which not even the Legislature could authorize as municipal enterprises, yet the court said that *bona fide* holding, plus the bond recitals, made the municipality liable.

While no case involving the effect of recitals in drain district bonds has been considered by the Michigan court of last resort, we believe it to be the duty of a Federal Court, under *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 61 S. Ct. 179, to ascertain from all available data what the state law is, and that it should consider any well reasoned opinion of a court exercising jurisdiction in the state which has been accepted by the bar and litigants. In the early part of the year 1939 Judge Fred M. Raymond, of the Western District of Michigan, in *Baker, et al.*, v. *Ruddiman No. 3 Valley Drain District, et al.*, had before him the precise question as here. The Ruddiman Valley No. 3 Drain District had built a drain and issued bonds therefor.

Later the State Court, in a taxpayers' suit (see *Township of Norton* v. *Cockerill*, 265 Mich. 405) held the project to be a sewer and restrained the levy of taxes against some properties and a township. In an unreported opinion rendered upon a motion of the drain district to set aside a default judgment, the court said:

> "This matter is before the court upon motion of Ruddiman Valley No. 3 Drain District to set aside its default entered about March 1, 1939, and the default judgment entered against it March 15, 1939. Assuming that defendant has made sufficient showing of excusable neglect in failure to appear and answer to entitle it to an order setting aside the default, there still remains the obstacle that it has not made showing of existence of competent evidence to establish a meritorious defense. See Koen *v.* Beardsley, 63 F. (2d) 595; William Lane, Inc. *v.* Selby Shoe Co., 45 F. (2d) 581; David A. Manville & Co. *v.* Francis Oil & Refining Co., 20 F. (2d) 473; Moore's Federal Practice, sec. 55.03.
>
> "By the answer which this defendant asks leave to file, it denies that plaintiffs have the right to institute this proceeding as a class action. It also avers that the County Drain Commissioner had no jurisdiction or authority in law to assess the lands embraced in the so-called drainage district, for the reason that the construction was not for a drain but for the purpose of a trunk line sanitary sewer.
>
> (We here omit a paragraph dealing with a question as to the court's jurisdiction.)
>
> "The International Typographical Union is a bona fide purchaser of the bonds. Recitals in the bonds certify that they were issued to build a drain pursuant to applicable drain laws and that all acts, conditions and things required to be done precedent to their legality had happened and had been performed in due form and time as required by law. In view of these recitals and upon well established authority, the court is of opinion that this defendant cannot now be permitted

to defend upon the ground of invalidity. See Royal Oak Drain Dist., Oakland County, Mich. *v.* Keefe (C. C. A. 6), 87 F. (2d) 786; Hackett *v.* Ottawa, 99 U. S. 86; City of Defiance *v.* Schmidt (C. C. A. 6), 123 F. 1; Thompson *v.* Village of Mecosta, 127 Mich. 522."

As the defeated party did not appeal and the judgment has been paid, which respondents can easily verify by an inspection of the records of the case, it may be regarded as evidence of State law. It is also evidence that jurists trained in Michigan law regard *Thompson* v. *Village of Mecosta* (*supra*) as a clear expression of Michigan law applicable to the plea of a drain district that it issued its bonds for something other than a drainage purpose.

There is no indication in any Michigan decisions that the Court of last resort disagrees with the general body of Federal law on the subject of bond recitals, or the rule condensed by Judge Dillon, which we have quoted. The rule necessarily implies that to be effective, the issuing officers must "by the true construction of the legislative enactment in that regard, be invested with power to decide whether the conditions precedent have been performed." The Master and District Judge properly construed the law as conferring implied authority on the Drain Commissioner. The report says (144):

"* * * Another important restriction requires that the officials making recitals be the ones logically authorized by statute to determine the truth of the fact recited. Northern National Bank of Toledo *v.* Porter Township, 110 U. S. 608, 28 L. Ed. 258 (1884); Moore *v.* Nampa, 276 U. S. 536, 72 L. Ed. 688 (1928). The restriction is hardly applicable to the case at bar, since the Drain Commissioner, who certified that the requirements of the Drain Act had been observed, would be the one official, if any, in a position to know whether there had been such compliance and there-

fore the one impliedly authorized to make the recitals. It does not appear to be necessary for the statute authorizing the issuance of bonds to expressly empower the issuing official to make recitals. See Bernards Twp. *v.* Morrison, 133 U. S. 523, 33 L. Ed. 726 (1890); City of Defiance *v.* Schmidt, supra; Gibbs *v.* School-District, supra. The Michigan case of Portsmouth Savings Bank *v.* Ashley, 91 Mich. 670, 52 N. W. 74 (1892), like the Anthony case, held that the bonds must have been duly executed before an estoppel can be invoked, the bonds in that case having been delivered without authority. The court found it unnecessary, in view of this holding, to discuss the rights of the bondholders against a defense that the bonds were issued for the unlawful purpose of aiding a railroad."

Spitzer v. *Village of Blanchard*, 82 Mich. 234, and *First Wisconsin National Bank* v. *Bessemer Twp.*, 286 Mich. 426, cited by the Court of Appeals, are in harmony with the general rule, and if one refers to the authorities which the former decision incorporates, *Dixon County* v. *Field*, 111 U. S. 83, and *Bernard Twp.* v. *Morrison* (*supra*), it is readily seen why they were decided against the bondholders. By the true construction of the legislative enactment, the officers who issued the bonds in those cases were not invested with power to decide whether the particular conditions precedent involved in those cases had been performed. In the *Village of Blanchard* case, the defect was the want of a proper election and excess of the debt limit. The issuing officers had nothing to do with the election, nor the determination of the assessed valuation to which the debt limit was related. In the *Township of Bessemer* case, authority was incomplete until the State treasurer had issued his certificate of full compliance. These drain bond issues were like the bond issues of the Villages of Mecosta, Frankfort, etc. The officials authorized to issue them were the only officers who could know their own purposes. *Chemical Bank & Trust Co.* v. *County of Oakland*, 246 Mich.

673, also cited by the Court of Appeals, supports petitioners' position, for there the recital was given effect even against the claim of an excess of debt limitation provision of the Constitution. The only other Michigan case cited by the Court of Appeals on this subject, *Portsmouth Savings Bank* v. *Ashley*, 91 Mich. 670, bears no relation to the subject, for there the bonds were never delivered. Officers, without any authority from the Village Council, delivered them without consideration. Of course, there could be no rights founded upon an instrument which never was issued.

With the utmost deference to the Court of Appeals, petitioners' complaint is that the court did not consider all the law of Michigan on the subject. By a superficial reading of some decisions, a selection of isolated passages therefrom, and application of unwarranted distinctions against other decisions, it arrived at a conclusion wholly at variance with Michigan law.

(c) *Error of Court of Appeals in holding duties of officers and others in relation to collection of taxes and maintenance of funds dependent upon question of whether a legal drain had been constructed.*

The Court of Appeals treats the obligation of officers and Macomb County, imposed by statute to provide for payment of the bonds, as worthless, unless the bonds from every standpoint are valid (650). If the enforceability of the bonds rests upon the ground of estoppel, the court holds that no one need recognize them or perform duties in connection with the raising and maintenance of funds for their payment. The court says that since the County and its various officers and boards which must levy and collect taxes did not sign the bonds, they could not be estopped and, therefore, no demand may be made against them for performance of their duties. This involves a strange distortion of legal reasoning.

If bonds are held enforceable against a municipality on the ground of estoppel an indebtedness is adjudicated, and its officials are then required to exert such taxing power as they have to provide funds for the payment of the debt. They are not concerned with the ground upon which the debt is adjudicated. If it were otherwise, there would be no practical benefit to a bondholder in obtaining a judgment upon bonds, where the only basis for such judgment is estoppel. His judgment would be a useless entry upon court records, if it did not afford him a basis for recovery of the amount adjudicated in his favor.

The County, under the amendment to the Drain Law, Act 331 Michigan Public Acts 1927, stands in the same relationship to the bonds as the assessing and collecting officers. It is obliged to advance and pay them out of its general funds, provided that such advancement shall not cause the debt of the County to exceed the constitutional limitation thereof. (Appendix 12.) The Court of Appeals has put into the statute a limitation which the Legislature did not see fit to include, by holding that this statute applies only to bonds issued to build a legal drain. We admit that the statute would not apply to invalid bonds, *i. e.*, those which the drain district is not obliged to pay, but contend that any bond adjudged to be the debt of the district, no matter on what ground the judgment rests, calls for the performance of the County's statutory duty. As before noted, the rule in Michigan forbids judicial interpretations to restrict or enlarge unambiguous language of the Legislature. The statute contains several conditions upon the right of the bondholder to call for payment, *i. e.*, there must be money in the general fund, and the advancement must not cause the County to exceed its debt limit. It does not say in addition to these limitations that it must also appear that a legal drain was constructed with the bond proceeds. If the Legislature had so intended it could have easily expressed this

additional limitation. A Federal Court should not assume legislative powers.

(d) *Error of Court of Appeals in ignoring effect of statute prohibiting collateral attack on the drain proceedings.*

In arriving at its conclusion that the districts and the taxpayers could attack in a collateral suit the validity of the drain, the court entirely ignored local statutes and decisions, which if considered would require a decision that the court is obliged to hold these matters foreclosed by failure to follow the statutory remedy of certiorari. The provision of the statute making certiorari the exclusive remedy of those who wish to attack the proceedings (Appendix 8) says in unambiguous language that there shall be no collateral attack, *i. e.*, "if no certiorari shall be brought within the time herein prescribed, the drain shall be deemed to have been legally established and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity." Probably the Court of Appeals felt that its view that the rights of bondholders had been barred by a prior adjudication made it unnecessary to consider this point, and naturally petitioners would be obliged to admit that if in some prior suit they had previously litigated their rights as bondholders, failure of the court to consider this point, or its erroneous view thereon, would not entitle them to relitigate. This only serves to emphasize what we have said on the first point in this brief, that the court's determination of the *res judicata* proposition is so essential to the decision that it cannot be regarded as an independent proposition.

This court has many times in the past sustained the validity of municipal bonds, where at the time of their issue judicial interpretations of empowering acts or the State Constitution assured purchasers that they were obtaining valid

obligations. It refused to adjudge the bonds void, where subsequent decisions placed adverse constructions upon the statute and the Constitution. *Douglas* v. *Pike County*, 101 U. S. 677; *Taylor* v. *Ypsilanti*, 105 U. S. 60.

In the former case this court said:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights under it are concerned, as much a part of the statute as the text itself, and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment."

Many states, as indicated in *Great Northern Railroad Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364, follow the same rule, and Michigan is one of them. *Pittsburgh etc. Iron Co.* v. *L. S. Iron Co.*, 118 Mich. 109, 127; *Donohue* v. *Russell*, 264 Mich. 217, 219.

In the latter case the court said:

> "The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision, except insofar as the construction last given would impair the obligations of contracts entered into or affect vested rights acquired in reliance on the earlier decisions."

It is true that in *Township of Lake* v. *Millar*, 257 Mich. 135, and *Meyering Land Co.* v. *Spencer*, 273 Mich. 703, the court said that this certiorari provision did not bar the suit because the jurisdiction of the Drain Commissioner was attacked, but that decision was contrary to the interpretations of the section which prevailed when the bonds were issued. The statute, its interpretation, and the expiration of the period for bringing certiorari, were conditions upon which parties necessarily relied in the purchase of their

bonds. The interpretations of this clause prior to the issuance of these bonds are clear.

In *Township of Clarence* v. *Dickinson*, 151 Mich. 270, plaintiffs in a collateral suit attacked the legality of a tax, and proved that while it was called a tax for the extension of a drain, it was really a tax for a new drain, and that the Commissioner lacked jurisdiction because the application was not signed by the number of persons required to sign applications for a new drain. Plaintiffs urged that inasmuch as the petition was not signed by the necessary number of qualified persons, the Drain Commissioner had no jurisdiction and the proceedings were a nullity and could be attacked collaterally. The court overruled this contention, saying:

> "I have no doubt cases may arise to which this law can have no constitutional application. Such a case will be presented if the proceedings before the Drain Commissioner violate constitutional rights. The fact that such cases may arise is no reason for declaring the law unconstitutional. It is to be presumed that the legislature intended to enact a constitutional law and not an unconstitutional law (Cooley on Constitutional Limitations, 7th Ed., p. 255), and it should be construed in accordance with this intent. The language of the statute indicates that the legislature intended to go to the limit of its authority, but it is also to be presumed that it did not intend to exceed those limits.
>
> * * * * * * *
>
> "Can the statute have constitutional application to this case? The only reason advanced for saying that it cannot, is this, viz., that equity can afford relief whenever the drain commissioner lacks jurisdiction. It is apparent from the foregoing reasoning that the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution. The objection to the jurisdiction in such cases must be a

valid constitutional objection. Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain, for he has a constitutional right to such notice, and if that right is disregarded, the proceedings are as to him a nullity. If, on the other hand, the objections to the jurisdiction are not of a constitutional character, it is obvious that the legislature has a right to say how they shall be raised, or, in its wisdom, deprive one altogether of the privilege of raising them.

"The jurisdictional objection raised by complainant is not of a constitutional character. The Constitution does not require the petition to be signed by five property owners liable to asessments for benefits. That requirement is purely statutory. The legislature might have dispensed with it altogether. It therefore possessed ample constitutional authority to declare how objections to its non-observance should be made. It had authority to declare that objections not so raised should be disregarded. It exercised that authority by the statute under consideration. That statute is therefore constitutional in its application to this case and it prevents complainants maintaining this suit."

This decision was reaffirmed in *Stellwagen* v. *Dingman*, 229 Mich. 159, where collateral attack was made upon drain proceedings and an injunction sought against the collection of a drain tax, because of a defective petition instituting the proceedings. The court said:

"In Township of Clarence v. Dickinson, 151 Mich. 270, wherein the objection was based on a claim that the requisite number of taxpayers liable to assessment for benefits had not signed the petition, it was held that 'the lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution.' It was said that—

" 'Such objection could be urged if no notice or opportunity of hearing was given to one whose property was to be taken for the construction of the drain,'

but that there is no constitutional requirement as to the number who shall sign the petition; that the requirement was statutory; that the legislature might provide that objections should be raised in the manner provided by the statute (by certiorari), and that the denial of other remedy was not a violation of constitutional rights. This decision has been quoted from with approval in the more recent cases of Cummings v. Garner, 213 Mich. 408, and Heliker v. Oakland County, 216 Mich. 593, *and must be accepted as the settled law of this State.* That it is in line with the weight of authority will be seen by a perusal of the note on page 856 of 9 A. L. R."

The *Stellwagen* case was decided in 1924, but a short time before these bonds were sold, and there had been no intervening decision. Therefore, as the law stood when these bonds were issued, bondholders were assured that there could be no collateral attack unless through want of notice or fraudulent conduct in respect to hearings a taxpayer was deprived of a hearing. It could not be said that a taxpayer had a constitutional right not to have a sewer built and to be assessed therefor, because after it became known that taxpayers were asserting distinctions between drains and sewers the statute was amended to specifically authorize the building of sewers, and it was held that this amendment was within the constitutional power of the Legislature. *Township of Warren* v. *Engelbrecht,* 251 Mich. 608; *Gray* v. *Dingman,* 279 Mich. 62.

We frankly concede that cases decided after the bonds were issued indicate that a different construction will now be given to the certiorari statute, and if Michigan followed the rule of giving all changes of interpretation retroactive effect, we could not urge this point. But as before noted, that rule is limited so as not to disturb rights which parties have acquired in reliance upon the earlier interpretation.

(e) *Error of Court of Appeals in failing to award bondholders money in the bond redemption fund.*

The Court of Appeals further ignored local law in failing to pass upon the rights of bondholders to the fund subject to the direction of the District Court derived from taxes voluntarily paid.

Assuming that the lower court correctly held on some proposition that the bonds are void, it was not justified in denying all relief to bondholders. We believe that it is well established law that where taxes are paid voluntarily by taxpayers to create a fund to pay bonds which have been issued, the collecting agency holds this fund in trust for bondholders; (*Vickery* v. *Sioux City*, 104 Fed. 164; *Thompson* v. *Emmett Irrigation District*, 227 Fed. 560), also that as trustee it must distribute it in accordance with the purpose under which it was paid, and that such agency cannot refuse to do this because the bonds represent a debt which the municipality could not create. *Willis* v. *Board of Commissioners*, 86 Fed. 872; *City of Akron* v. *Barber Asphalt Co.*, 171 Fed. 29. The lower court, however, by denying all relief and ordering the bill dismissed deprives bondholders of all interest in the fund.

Under Michigan law (see p. 13 Appendix), this fund can only be used for the purpose of paying bonds. Those who paid the taxes to create it cannot have it refunded to them, as they failed to pay their taxes under protest and sue for the amount paid within thirty days. *Township of Norton* v. *Cockerill*, 265 Mich. 405; *Brooks* v. *Oakland County*, 268 Mich. 637. The effect of the lower court's decision is to turn this money over to Macomb County as a gift.

It is our contention that in any event this money should be paid to bondholders, as the bonds, even if invalid as obligations of the districts, can be treated as certificates of participation in the fund. *Chelsea Savings Bank* v. *Ironwood*, 130 Fed. 410.

3. Error of Circuit Court of Appeals in refusing to restrain use of taxpayers' decree to impede tax collections.

An important question which the Court of Appeals has apparently decided in conflict with the decision of this court in *Chase National Bank* v. *City of Norwalk*, 291 U. S. 431, and the Court of Appeals of the Eighth Circuit in *Fetzer* v. *Johnson*, 15 Fed. (2d) 145, relates to the power of a Federal Court to restrain by its injunction parties before it from using decrees or judgments they have obtained in courts of concurrent jurisdictions in a manner inimical to parties who properly seek relief before them. This Court of Appeals, by its decision in the *City of Norwalk* case, evidenced its extreme caution in enjoining parties from making use of a judgment of ouster from the streets of an Ohio city of a public utility corporation, where the mortgagee of the properties and franchises of the corporation had not been given its day in court. It still seems to adhere to the same theories which caused it to be reversed by this Court.

The District Court we think properly decided that it had power to enter such personal decrees in favor of and against parties before it, as the rights of such parties required. We think that when a Federal Court is called upon to administer equity, and has jurisdiction of the subject matter and parties, it has power to and should exercise its jurisdiction to the fullest extent to settle all matters in controversy and to afford complete relief, unless restrained by some express statutory or constitutional provision. There is no Federal statute which forbids a Federal Court to restrain parties in a proper case from taking advantage of a judgment or decree of a court of concurrent jurisdiction. If the bonds are valid, bondholders are entitled to have taxes pledged to their payment, and such taxes as may subsequently be levied, enforced. The court's jurisdiction

does not cease with a mere judgment in favor of bondholders. It continues to afford such relief as may provide for payment. *Riggs* v. *Johnston County*, 6 Wall. 166; *U. S.* v. *Council of Keokuk*, 6 Wall. 514. We submit that if the bonds are valid on any ground, and if bondholders are not barred by prior adjudication, they are entitled to injunctions restraining taxpayers who are parties to the suit from impeding officials from levying and enforcing the taxes. Such injunctions are not issued against other courts, but against parties who threaten wrongful use of such judgments and decrees.

VI

Conclusion.

The first and third propositions advanced in this argument, being comparatively simple questions of Federal law and vitally affecting the rights of all citizens, ought, we think, to be specifically decided by this Court. The second proposition may only be considered of importance in this Court insofar as it appears that the Court of Appeals departed from a proper course of action which a Federal Court should follow in administering state law. It is discussed in this brief because it is necessary to completely present boldholders' case. If the Court is reluctant to fully consider this proposition, we think a just decision will finally be reached if the Court of Appeals is reversed on the first and third points, and the case remanded with directions to fully consider all applicable local law relating to the second point.

We again call the Court's attention to the fact that the same legal issues decided by the Court of Appeals are now before the Supreme Court of Michigan awaiting decision. (See *ante* page 12.)

We, therefore, submit that the accompanying petition for a writ of certiorari ought to be granted.

DAVID M. WOOD,
48 *Wall St., New York, N. Y.*

RAYMOND J. DYKEMA,
2746 *Penobscot Bldg.,*
Detroit, Mich.,
Counsel for Petitioners.

APPENDIX.

Portions of the Michigan Drain Law Applicable to Case.

This appendix is intended to furnish a guide for the court to applicable portions of Michigan drain statutes. It omits chapters relating to inter-county drains and portions inapplicable to this and the three companion cases covered by the opinion of the Circuit Court of Appeals, directing entry of decrees which are sought to be reviewed. The codification of Michigan statutes relating to drains is Act 316, Public Acts of Michigan 1923. This was amended in some particulars by Acts 365 and 331 of the Michigan Public Acts of 1925 and 1927, respectively. At the beginning of each section we indicate the year in which the section was enacted. Unless otherwise indicated, the section remained in that form during succeeding years material to these cases.

Ch. I, Sec. 2 (1925) The word "drain" whenever used in this act shall be deemed to include any water course or ditch, opened or proposed to be opened, and improved for the purpose of drainage, and any artificial ditch or drain levee, dyke or barrier, or tile drain proposed or constructed for such purpose, structures and such mechanical devices as will properly purify the flow of such drains.

Ch. III, Sec. 1 (1923) Before a commissioner takes any action on any application to locate, establish and construct any drain, there shall first be filed with him an application to lay out and designate a drainage district with reference to a proposed drain therein; such application shall describe such proposed drain by its starting point, its general direction and terminus. The application shall be signed by not less than ten freeholders of the township or townships in which such proposed drain, or the proposed lands to be drained thereby, may be situated: Provided, That one-half of said signers shall be owners of land liable to an assessment for the construction of such proposed drain: Provided Further, If it shall appear upon filing an application to lay out and designate a drainage district that said district might not include ten freeholders whose lands would be

liable for such assessment, in such case such application shall be received if signed by any freeholders liable to an assessment for the construction of such proposed drain. The eligibility of the signers to such application shall be determined by their interest of record in the office of the register of deeds, in the probate court or in the circuit court of the county in which such lands are situated at the time such application is filed.

(A slight change in this section was made in 1927, not material to this case.)

Ch. III, Sec. 2 (1923) Upon receipt of such application for new drainage district, the commissioner shall immediately cause a survey of such proposed drain to be made by a competent surveyor or engineer: Provided, That if the application shows, or it shall be determined after the survey, that any such proposed drain will traverse more than one county or will affect lands liable for assessment for benefits in more than one county, said commissioner shall proceed under the portions of this chapter relating to inter-county drains. If upon such survey, or if before such survey is made, the commissioner shall determine that the proposed drain is impractical, he shall take no further action thereon but shall, in writing, notify the person or persons who delivered such application to him, of that fact, and his reasons for making such determination. If upon such survey the said commissioner shall determine such proposed drain to be practical, he shall lay out a drainage district, including therein all tracts or parcels of land, highways, townships and cities which would be benefited by the construction of such proposed drain, and which would be liable to an assessment therefor, should such drain be constructed as hereinafter provided.

Ch. III, Sec. 4 (1923) The commissioner shall thereupon prepare his order designating a drainage district so laid out and give it a name or number and describe therein the several tracts and parcels of land, highways, townships, and cities which would be benefited by the construction of such proposed drain and would be liable to assessment therefor. Also a description of the drain proposed in such application

showing its beginning, route, terminus, width, depth, yards of earth necessary to be removed in such proposed construction, and the estimated cost of such construction. The order designating such drainage districts, together with the application therefor, shall thereupon be filed in the office of the county drain commissioner of the county in which such drainage district is situated. The commissioner shall give notice of filing such order designating a drainage district by publishing a notice once in each week for two successive weeks in a newspaper, or newspapers, of general circulation in the county in which such district is situated, which notice shall give a general description of the route of the proposed drain as shown by the survey, and the names of the freeholders whose lands would be traversed thereby.

(A slight change in this section was made in 1927, not material to this case.)

Ch. IV, Sec. 1 (1923) After a drainage district has been established and the order therefor filed with the county drain commissioner, a petition to locate, establish and construct a drain may be filed with the commissioner having jurisdiction of the lands designated in such order as would be benefited by such construction. Such petition shall ask for the location, establishment and construction of a drain which will properly drain the lands described in such order. The petition shall be signed by a number of freeholders in said drainage district whose lands would be liable to an assessment for benefits equal to one-half of the number of freeholders whose lands would be traversed by said drain. The eligibility of the signers to such petition shall be determined by their interest of record in the office of the register of deeds, in the probate court or the circuit court of the county in which such lands are situated, at the time such petition is filed. Such petitioners shall be jointly and severally liable for all costs and expenses for the filing of such petition in case the proceeding shall be dismissed. If the persons signing such petition shall refuse to pay such costs and expenses, the commissioner shall bring suit in a court of competent jurisdiction and collect such costs and expenses. If the financial responsibility of petitioners shall

upon the filing, or thereafter, be determined insufficient, additional signatures may be required or such security furnished as will be approved by the commissioner.

Ch. IV, Sec. 2 (1923) Upon the filing of such petition, the commissioner authorized to act thereon shall as soon as practicable thereafter serve upon the judge of probate of the county a copy of said petition. Within fifteen days after the service of said notice upon him it shall be the duty of the judge of probate so notified to appoint a board of determination, to call a meeting thereof at some place to be designated by said judge and which shall be as centrally located as possible within the drainage district, giving notice of the time and place of such meeting, and the said judge shall cause a copy of such notice to be published for not less than one week in a newspaper published and in general circulation in the county. The said board of determination shall be composed of three members each of whom shall be the supervisor of a township within such county into which the drainage district does not extend. At the time and place fixed in said notice said board shall meet, elect a secretary and proceed to determine the necessity of said proposed drain and whether the same is necessary and conducive to public health, convenience and welfare. At such meeting all persons owning lands liable to assessment for benefits, or whose land shall be crossed by said drain, or any district or municipality affected, may appear for or against said drain proceeding. After hearing the evidence so offered as herein provided, the board shall make their determination upon the necessity of such drain and whether the same is necessary and conducive to public health, convenience and welfare.

If the said board shall find by a majority vote of the whole number of members present and voting thereon that the said drain is not necessary or conducive to public health, convenience or welfare, they shall file with the Commissioner an order dismissing the petition and no further petition for said drain shall be entertained within one year after such determination. If said board by a majority vote, as aforesaid, shall find the said drain so proposed to be necessary and conducive to the public health, convenience

and welfare, they shall make their order to that effect and file the same with the said commissioner.

Upon the receipt of the order of said board, the commissioner shall make his first order of determination in writing, giving the name or number of the drainage district, and shall establish the commencement, route, and terminus of said drain and the width, depth and length thereof, a copy of which order he shall within five days file in his office.

(A slight change in this section, relating to the number of persons who should constitute the board of determination, was made in 1927. The balance of the chapter relates to procedure to obtain right-of-way.)

Ch. VI, Sec. 1 (1925) Upon the release of the right of way and damages, or upon the determination and return of the special commissioners, the commissioner shall make his final order of determination establishing the drain, which drain shall be divided into convenient sections for the letting of contracts. A certified copy of said order of determination shall be filed with the county drain commissioner within five days after such order is made. He shall before the day of letting and review apportion the per cent of the cost of construction of such drain which any township or city traversed or benefited thereby shall be liable to pay by reason of the benefit to the public health, convenience or welfare, or as the means of improving any highway under the control of such township or city. He shall apportion the per cent of the cost of construction of such drain which any highway then under the control of the state, county or township highway commissioners shall be liable to pay by reason of benefits therefor, and he shall also apportion the per cent of benefits to accrue to any piece or parcel of land by reason of the construction of such drain and above the per cent apportioned to any township or city at large or to any highway, as above provided. Such per cent so apportioned when finally approved shall be assessed against such township, cities, highways and lands according to such apportionment of benefits as hereinafter provided. The apportionment of benefits so made shall be subject to review and correction and may be appealed from as in this chapter provided. The board of

supervisors at its October meeting of each year shall make provision by proper assessment of the amounts apportioned against any highway under control of district highway commissioners and any highway under control of county highway commissioners.

(A slight change was made in this section in 1927 in relation to assessments against municipalities.)

Ch. VI, Sec. 4 (1925) The commissioner shall give notice for the holding of a public meeting, at which a review will be had of the apportionment of benefits made as aforesaid and also for the purpose of letting a contract or contracts for the construction of such drain. Notice of such hearing shall be given by publishing a notice thereof, at least two insertions in some newspaper published and of general circulation in the county, if there is one. Such notice shall be so published at least once not less than ten days prior to the hearing. The commissioner shall also give notice of such hearing by posting notices thereof in five conspicuous and public places in each township where the district is located, within the limits of said districts at least ten days prior to such hearing: Provided, That in all cases where the apportionment of benefits shows less than one hundred descriptions upon which benefits have been apportioned, personal service shall be had upon all resident land owners within the drainage district, at least ten days prior to such hearing. As to all other land owners, notice shall be given by posting and publication as above provided. Such notice shall also be personally served upon the supervisor of each township affected, the mayor of each city and upon the chairman of the highway commissioners having charge of any highway apportioned a per cent of the cost of such construction. Such notice shall contain the names of all cities, townships or highways affected. Such notice shall contain a description of the several tracts or parcels of land constituting the special assessment district of such drain: Provided, That it shall not be necessary to subdivide any tract or parcel beyond the point where the whole thereof is within such drainage district or to describe the said drain further than by reference to it by its name or number, and it shall also state the number and length of

sections; the average depth and width of each section; and in case of tile drains, the amount and specifications of all tile required; the location, number, type and size of all culverts and bridges and the conditions upon which the said contract or contracts will be awarded; and in no case shall said notice contain the minutes of survey or table of cuttings which shall be kept on file in the office of the drain commissioner and be open to inspection at the time and place of such letting, and that at the time and place of such letting, or at such other time and place thereafter to which the county drain commissioner may adjourn the same, the apportionment of benefits and the lands comprised within the special assessment district shall be subject to review for at least one day; such review shall be held open from nine o'clock in the forenoon until five o'clock in the afternoon. On such reviews the supervisor or commissioner of highways of any township may appear on behalf of such township. The mayor or some officer of the city designated by him may appear for such city, and any district or county road commissioner may appear on behalf of such district or county. At such review the county drain commissioner shall hear the proofs and allegations of all parties interested, and shall carefully reconsider and review the description of land comprised within the special assessment district, the several descriptions and appointment of benefits, and define and equalize the same as may seem just and equitable. Whenever an apportionment of benefits shall be made against a state trunk line highway, the drain commissioner shall at least twenty days before the review thereon notify by registered mail the state highway commissioner of the percentage apportioned against such highway and the date and place fixed for the review of all apportionment of benefits. If the state highway commissioner desires to have such apportionment of benefits reviewed by the state commissioner of agriculture, he shall within ten days from the receipt of such notice, file with the drain commissioner an objection to the apportionment. The drain commissioner shall then notify the state commissioner of agriculture of the day and place fixed for such review of apportionments and at such meeting the commissioner of agriculture or some deputy selected by him, shall review the apportion-

ment made against the said state trunk line highway, listen to the proofs and allegations of the parties and may view the highway benefited, and his action and decision, thereon, reduced to writing shall be final.

(Slight changes made in this section in 1927, relating to service and publication of notice.)

Ch. VI, Sec. 11 (1923) The proceedings in establishing any drain shall be subject to review upon certiorari, as herein provided. Notice of such certiorari shall be served upon the commissioner within ten days after the copy of the final order of determination of such commissioner in establishing any drain has been filed in his office as provided in section one of chapter six in the same manner as notice is required to be given of certiorari for reviewing judgments rendered by justices of the peace, and the writ shall be issued and served, and bond given and approved and the subject matter brought to issue in the same time and manner, as near as may be, as in such cases provided, except that such certiorari may be heard by the court during term, or at chambers, upon five days' notice given to the opposite party; and the circuit court of the county shall hear and determine the same without unnecessary delay, and if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside. If the proceedings be sustained, the party bringing the certiorari shall be liable for the costs thereof, and if they be not sustained, the parties making application for the drain shall be liable for the costs. If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and its legality shall not thereafter be questioned in any suit at law or equity: Provided, No court shall allow any certiorari questioning the legality of any drain by any person unless notice has been given to the commissioner in accordance with the provisions of this chapter: Provided further, That when such proceedings are brought, the commissioner shall postpone the letting of contracts and all other proceedings until after the determination of the court. And if any error be found in the proceedings, the court shall direct the commissioner

to correct such error or errors and then proceed the same as though no error had been made.

(Slight changes made in this section in 1927, relating to procedure where errors occur after the final order of determination.)

Ch. IX, Sec. 3 (1923) Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same, and to pay all the costs and incidental expenses or to pay the principal and interest on bonds if such are issued, a further assessment shall be made to meet the deficit or additional expense. Such further assessment shall be apportioned, assessed, levied and collected as provided in the first instance, and on the same percentage, and shall be collected in one year, but there shall be no review of nor appeal from such further assessment.

Ch. X, Sec. 1 (1923) Within ten days after the letting of contracts, or in case of an appeal, then forthwith after such appeal shall have been decided, the commissioner shall make a computation of the entire cost of such drain which shall include (1) all the expense of laying out and designating the drainage district, which item of expense shall include the entire cost of the survey; (2) the expense of locating, establishing and constructing the drain; (3) the fees and expenses of special commissioners; (4) the compensation to be paid the board of review; (5) the cost of construction of bridges and culverts; (6) the contracts for the construction of the drain, or other work to be done on said drain; (7) the estimated cost of an appeal in case the apportionment made by the commissioner shall not be sustained; (8) the expenses of the state commissioner of agriculture, where called; (9) the cost of publishing all notices required; (10) and all fees of the probate judge, and he shall add the whole into a gross sum and add thereto five per cent of said gross sum to cover contingent expenses and the entire sum so ascertained shall be deemed to be the cost of construction of such drain.

Ch. X, Sec. 2 (1923) The Commissioner shall thereupon make a special assessment roll for such drain for each township, city or highway affected thereby, which roll shall be

designated "(giving the name) drain special assessment roll," and he shall enter therein a correct description of the tracts, parcels or subdivisions of land benefited by such drain and place opposite each description the amount of the per cent heretofore determined upon by him or by the board of review, as the case may be. He shall also enter thereon the amount of the per cent apportioned to such township, city or highway, and in case such amount be payable in installments, he shall also enter thereon a memorandum of the installments thereof and of the year or years when such installments shall be spread; and shall add a certificate in writing of the determination whether the taxes assessed for benefits shall be paid in one or more years. Such rolls shall be dated and signed by said commissioner and filed on or before the last Wednesday in September in each year, in the office of the county clerk.

(Slight changes in procedure were made in a 1927 amendment to this section.)

Ch. X, Sec. 5 (1923) All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. Drain taxes, when collected, shall be returned to the county treasurer to be disbursed by him. In all cases where suit is brought against the collector arising out of the collection of any drain tax, the county shall defend such officer in the same manner that he has now the right to be defended in the collection of general taxes. No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty days from the time of payment of such money to, or sale of such property by, the collecting officer; and if such tax shall be paid under protest the reasons therefor shall be specified, and the same procedure observed as is or may be required by the general tax law. All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon

the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid.

Ch. X, Sec. 6 (1923) If the taxes levied for the construction, cleaning out, widening, deepening, straightening, or extending of any drain are not collected by the township or city treasurer, they shall by him be returned, together with the lands upon which they were levied, to the county treasurer in the same return, at the same time, and in the same manner, in every respect (naming in each case the particular drain), as lands are returned for state, county and township taxes, and such taxes shall follow such lands, the same as all such other taxes, and all the general provisions of law now existing, or that may be hereafter enacted for enforcing the payment of township, county and state taxes, shall apply to such drain taxes, and to the lands returned delinquent therefor, in the same manner and with like effect.

Ch. X, Sec. 14 (1923) In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the commissioner shall be made a party to said suit.

Ch. X, Sec. 15 (1925) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than three installments, said commissioner may borrow money in anticipation of the collection of all installments after the first and may issue as evidence thereof the bonds of the drainage district as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied exclusive of the first installment. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable at such time or times, not exceeding ten years from the date thereof, as may be determined upon by the commissioner or as may be required by the date of maturity of the installments levied, it being the intent hereof that the dates of maturity of obligations issued hereunder shall be as nearly identical as is practicable with the collection of

the installment of drain taxes. (Provided that in cases where the estimated cost of any drain exceeds ten dollars per running foot, the drain commissioner may in his discretion determine that bonds issued hereunder may be made payable in not to exceed fifteen years from the date thereof). The commissioner shall prescribe the form of the bond and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities and highways assessed at large, in the proportion that they are taxed for the benefits received thereby. In no case shall such bonds be sold for less than par and accrued interest. If any premium is received thereon such premium shall belong to the fund of the drain. The commissioner may make payment or partial payment of the cost of the drain in such bonds, or may sell part or all thereof, depositing the proceeds in the county treasury to the credit of the drain fund, to be disbursed as herein provided. The county treasurer shall safely keep all such bonds until sold as above provided.

Ch. X, Sec. 15 (1927) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than one installment, said commissioner by and with the written approval of the judge of probate and the county treasurer of the county, may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage districts as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first nor later than June first of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed fifteen and the amount of each installment shall be fixed by the commissioner to correspond as near as may be to his estimate of the amount of taxes actually collectible each year. The commissioner

shall prescribe the form of the bond by and with the written approval of the judge of probate and the county treasurer of the county shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby: Provided, That the written consent as above set forth of any judge of probate or county treasurer shall not be required in proceedings relating to inter-county drains. Such bonds shall be advertised and sold by the drain commissioner after the manner provided for the advertisement and sale of municipal bonds by act number two hundred seventy-three of the laws of nineteen hundred twenty-five and any amendments which may be made thereto governing such advertisement and sale. If any premium is received thereon such premium shall belong to the fund of the drain. The proceeds derived from the sale of such bonds shall be deposited with the county treasurer to the credit of the drain fund. The county treasurer shall safely keep all such bonds until sold as above provided. In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the county shall not cause the total debt of the county to exceed the constitutional limitation thereof.

Ch. X, Sec. 16 (1923) In cases where bonds are issued and sold by the commissioner all installments of the drain taxes subsequent to the first installment shall bear interest at the rate of six per cent per annum from the date of the preparation of the assessment roll until due. Such bonds may provide, if the commissioner so determines, for the payment of interest semi-annually. All of said subsequent installments and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of the drain to be used solely for the payment of bonds as the same shall mature. All moneys thus collected in anticipation of the maturity of the bonds shall be depos-

ited by the county treasurer in a bank or banks to be designated by the board of supervisors of such county and the interest received shall belong to the fund: Provided, however, That any bank receiving county drain funds hereunder shall give bond to the county treasurer in an amount not less than the sum so deposited.

Ch. X, Sec. 18 (1923) If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay the same with interest, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain.

Ch. XVII, Sec. 5 (1925) Any county drain may be used for sewage disposal by any city, village or township for which it shall be available, but shall be kept cleaned out or enlarged as the county drain commissioner may determine to be necessary for the carrying off of the sewage and the natural flow of said drain at the expense of the city, village or township using the same, and if used by more than one, the expense to be borne by each shall be determined by the board of supervisors. Disposal plants, filtration beds and other mechanical devices as will properly purify the flow of any drain may be constructed and become a part of any established drain, the cost of construction therefor to be paid for in the same manner as other drainage costs as in this act provided. Such plants, beds, or devices may be described in the petition for the location, establishment and construction of drains or in the petition for the cleaning, widening, deepening, straightening or extending of drains, or in the application for the laying out of a drainage district. Petitions for the construction of such plants, beds and devices for use on any established drain may be filed by the same persons and shall be received and all proceedings had thereon in the same manner as other petitions for any drainage construction under this act. Plans and specifications for the construction as part of a drain of any disposal plant, filtration bed or other mechanical device to

properly purify the flow of such drain shall be prepared, subject to the approval of the state commissioner of health, and shall be filed with the drain commissioner. Contracts for such construction shall be let in the manner provided in chapter eight of this act. To meet the cost of such construction the drain commissioner shall apportion the per cent of such cost among the several parcels of land, highways and municipalities benefited thereby. The costs and charges for maintenance shall be apportioned and assessed each year. In case the apportionment shall be the same as the last recorded apportionment, no day of review shall be necessary, but in case the apportionment shall be changed, notice of a day of review shall be given to such persons or municipalities whose percentage has been raised. Lands may be acquired as a site for the construction of such plants, beds and devices, and releases thereof may be obtained in the same manner as other lands for right of way as in this act provided.

FILED
SEP 18 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,

vs.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI AND BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

THE BOARD OF TRUSTEES OF THE INDIANA STATE TEACHERS' RETIREMENT FUND,
By JOSEPH W. HUTCHINSON,
Deputy Attorney General of State of Indiana.

Business Address:
219 State Capitol Building,
Indianapolis, Indiana.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

	Page
Petition for Leave to File Brief in Support of Petition for Certiorari	1
Brief in Support of Petition for Certiorari	3
Reasons for Delaying Action on Petition for Certiorari to Await State Court Decision	3
Why Decision Favorable to Bondholders May Be Expected:	
1. Res Judicata. Drain Commissioner does not represent bondholders	5
2. Bond recitals constitute an estoppel	5
3. Immunity of drain proceedings to collateral attack	7
4. No real illegality on the bonds	8

TABLE OF CASES CITED

Bloomfield Village Drain District v. Keefe, 119 F. (2) 157	3
Cadillac v. Woonsocket Inst. for Savings, 58 F. 935	5
Clapp v. Marice City, 111 F. 103	6
Defiance v. Schmidt, 123 F. 1	6
Detroit Trust Co. v. Dingman, 291 Mich. 170	8
Donohue v. Russell, 264 Mich. 217	7
Kent v. Dana, 100 F. 56	5
Michalek v. U. S. Gypsum Co., 288 U. S. 639, 76 F. (2) 115	4
Pittsburgh, etc., Iron Co. v. L. S. Iron Co., 118 Mich. 109	7
Risley v. Howell, 64 F. 453	5
Schmid v. Merchants Dispatch & Transp. Co., 270 N. Y. 287	4

Page

Schmid v. Village of Frankfort, 131 Mich. 197..... 6
Stellwagen v. Dingman, 229 Mich. 159..... 7
Thompson v. Village of Mecosta, 127 Mich. 522..... 6
Township of Clarence v. Dickinson, 151 Mich. 270... 7

TEXT CITED

Robertson & Kirkham, Jurisdiction of Supreme Court of U. S., Secs. 290, 301..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,

vs.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITION FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Board of Trustees of the Indiana State Teachers' Retirement Fund show unto the court as follows:

1. That it has control of a fund of securities devoted to payment of pensions for teachers in Indiana Public Schools. In the fund are $150,000.00 par value of bonds issued by Martin Drain & Branches Drain District, part of the issue of bonds involved in the suit above entitled.

2. The Board of Trustees were not parties of record in the proceedings in the lower court, but did file a brief in support of a petition for rehearing in the Circuit Court of Appeals. However, they may be affected by any decision in the case, as this is a class suit brought in behalf of all holders of the bonds.

3. Having a substantial interest in the petition for certiorari, they request the court to consider the accompanying brief in their behalf.

THE BOARD OF TRUSTEES OF THE INDIANA STATE TEACHERS' RETIREMENT FUND,
By JOSEPH W. HUTCHINSON,
Deputy Attorney General of State of Indiana.

Business Address: :
219 State Capitol Building,
Indianapolis, Indiana.

BRIEF FOR THE BOARD OF TRUSTEES OF THE INDIANA STATE TEACHERS' RETIREMENT FUND, IN SUPPORT OF PETITION FOR CERTIORARI

We desire to emphasize the point that if the court is reluctant to grant the petition for certiorari, it should delay action thereon until the case now pending in the Supreme Court of Michigan, entitled *City of Highland Park, et al., v. Clark, et al.,* No. 41690, is decided.

This case involves the question of whether a peremptory writ of mandamus should issue to compel the levy of taxes to support an issue of bonds made by Royal Oak No. 7 Drain District, Oakland County, Michigan. It is an original suit in the Michigan Supreme Court, as permitted by Michigan law. The issues in it are framed by the petition of City of Highland Park and other holders of bonds, and the return to an order to show cause filed by the County Drain Commissioner and Board of Supervisors. The applicants for the writ show in their petition that they are good faith holders of bonds issued by the Drain District under the same law under which the Martin Drain and Branches Drain District bonds were issued, and that the bonds are in default and cannot be paid unless taxes are levied. Similar issues to those involved in the present suit are likewise involved in the State Court action, as the bonds contain the same recitals and it is claimed that they are void even as against *bona fide* holders because the drain, so-called, is in reality a sewer, and was so held in a suit brought by one of the taxpayers in the district. (*Village of Oak Park v. Van Wagoner,* 271 Mich. 450.) We are advised that the County officers rely upon the decision in *Bloomfield Village*

Drain District, et al., v. Keefe, 119 Fed. (2) 157, and the Michigan court will have to say whether it agrees with this decision or not. We can see no way in which the Supreme Court of Michigan can reach a conclusion favorable to the issuance of a mandamus without declaring a legal proposition, which would be applicable to the bonds involved in this petition for certiorari.

For that reason, we think this is a case in which the court should properly await the decision of the State Court of last resort, as it has done where similar situations have arisen in the past. Robertson & Kirkham, in their work on *Jurisdiction of the Supreme Court of the United States,* Section 290, page 559, and Section 301, page 602, call attention to several instances where this has been done. Of particular interest as a precedent, we call the court's attention to *Michalek v. U. S. Gypsum Co.,* 288 U. S. 639, wherein the court reversed a court of appeals (76 Fed. (2) 115), after holding the application for certiorari for many months to await a decision by a state court of last resort in *Schmid v. Merchants Dispatch & Transportation Co.,* 270 N. Y. 287. By awaiting the state court decision, this court achieved a result which all must admit promoted the ends of justice and conformity with state law.

Obviously, no one can predict how soon the Michigan Supreme Court will decide the case before it. We are informed, however, that at the latest it can be expected during the current year. Consequently, there will be only a short delay.

The history of this case surely indicates considerable doubt as to whether the Circuit Court of Appeals correctly interpreted the law of Michigan. Well reasoned opinions in the District Court interpreted the local law differently. No assertion of the state of the local law on any of the subjects involved can now be more than an opinion based upon

analogies. Either side can prophesy as to what the Michigan court of last resort will say, but until it has spoken there is no certain and definite rule to be applied. From our examination of the state law, we believe that reasons predominate for predicting a conclusion favorable to bondholders. We shall present these reasons on the various points presented in the petition for certiorari.

1. *Res Judicata.* To arrive at the conclusion that a decree obtained by a taxpayer is an adjudication against bondholders, the Court of Appeals was obliged to interpret a provision of the drain law requiring joinder of the Drain Commissioner in suits to set aside drain taxes, in a manner quite remote from anything directly said by the legislature. This simple requirement of the drain law is transformed into a provision investing the Drain Commissioner and his successors in office with such representative capacity as respects holders of bonds of a drain district, that any point decided against him in a suit brought by a taxpayer to cancel his taxes becomes a judicial determination against bondholders. If any court is to interpret a state statute in a manner so utterly at variance with express language of a legislature, it ought to be the state court and not the federal court. The Michigan Supreme Court's view on the meaning of this clause ought to be awaited.

2. *Estoppel by Bond Recitals.* There can be no doubt that the principle prevails generally that a municipality is estopped as against *bona fide* holders of its bonds from claiming that they were issued for an unlawful purpose, when the bonds recite on their face full compliance with the governing law. The Circuit Court of Appeals' own prior decisions, written by eminent jurists who later became members of this court, declare this principle in unmistakable terms in *Cadillac v. Woonsocket Institute for Savings,* 58 Fed. 935, *Risley v. Howell,* 64 Fed. 453, *Kent v. Dana,* 100

Fed. 56, *Clapp v. Marice City,* 111 Fed. 103, and *Defiance v. Schmidt,* 123 Fed. 1, and the Michigan Supreme Court in *Thompson v. Village of Mecosta,* 127 Mich. 522, followed these decisions.

Yet the Court of Appeals, we think, in effect says this principle does not apply in Michigan. It rejects the two leading cases in Michigan, *Thompson v. Mecosta (supra),* and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that they do not establish the principle in Michigan, because the village themselves took part in a false recital. This distinction is veiled in mystery. The Court of Appeals does not see fit to explain how a village can take part in a false recital, unless some officer or group of officers perform the act of making the recital in behalf of the village. The village as a corporate entity can do nothing except through agents. While in these cases the court properly called attention to the fact that citizens to some extent knew of the real purpose of the promoters of the scheme to use public credit for private advantage, as having a bearing on the equities of the case, the opinions of the Michigan court in deciding those cases contain no indication that the decision would have been any different without such knowledge on the part of the citizens. Neither the Michigan court, nor any other, has ever limited the application of the estoppel doctrine by the degree to which citizens of the community knew that their officials intended to abuse the power to issue bonds. It is our understanding that a municipality, like any other corporation, must accept responsibility for the acts of its agents who are placed in a position to make representations in its behalf. It cannot accept the benefits of such agents' acts, and repudiate attendant obligations. The same equities arise against taxpayers in drain districts. No drain can be constructed without the affirmative acts of a substantial number of the taxpayers. No drain tax can

be imposed except after wide publicity given to the proceedings and extended opportunity to raise objections.

These decisions of the Michigan Supreme Court, and others which the Court of Appeals ignores entirely, cannot be so lightly disregarded. If they are to be overruled, or their authority diminished, it should rest with the Michigan court of last resort, rather than the Federal Court, to destroy their effect.

3. *Immunity of Drain Proceedings to Collateral Attack.* The Court of Appeals ignored entirely the proposition that these bonds were acquired under a provision of the law forbidding any court to question the validity of the drain in a collateral suit. Although briefs in the Court of Appeals clearly presented the proposition, together with the legal principle applicable in Michigan protecting parties who acquire rights on the strength of statutory provisions and their judicial interpretations, the Court of Appeals gave no consideration to that phase of the case.

The drain law was so drawn as to require all who would contest the proceedings to do so promptly, and at a time when there could be correction of any matters questioned. The law was designed to avoid the injustice of throwing the cost of drainage improvements upon creditors of the district after the land owners had secured the benefits.

The Michigan court has never indicated that this statute, and the interpretations placed upon it in *Township of Clarence v. Dickinson,* 151 Mich. 270, and *Stellwagen v. Dingman,* 229 Mich. 159, and the protective principle declared in *Pittsburgh etc. Iron Co. v. L. S. Iron Co.,* 118 Mich. 109, and *Donohue v. Russell,* 264 Mich. 217, should be ignored. Until the Michigan court so declares, this statute and these decisions are part of the law of Michigan, and any decision in this or a similar case against the rights of bondholders must recognize them.

4. *Is There Any Real Illegality in These Drain Bonds?* The whole foundation of the effort to repudiate these bonds rests upon a legal quibble that the Martin Drain & Branches is not a drain, as it is called in the bonds and the proceedings,—that it is, in fact, a sewer. No legal principle is announced in any Michigan decision that a drain commissioner, acting on behalf of a drain district, may not build an underground drain of a capacity sufficient to drain the district, merely because such a structure might be used to transport sanitary sewage.

If this is not a drain, what is lacking? How should it have been constructed to avoid the present condemnation? The Court of Appeals does not say, and we are left in the dark as to why more than one million dollars worth of bonds should be declared invalid. The Michigan court has said, in *Detroit Trust Co. v. Dingman,* 291 Mich. 170, that the same law under which these proceedings were taken authorized the building of underground structures of this type, even though intended to remove sewage along with the drainage water. The Court of Appeals will not recognize this decision as of any force, because it related to a different drain. We submit that this distinction is as inconclusive as the distinctions applied to *Thompson v. Mecosta,* 127 Mich. 522.

If this court should believe that *Detroit Trust Co. v. Dingman (supra)* is limited to the particular improvement considered in that case, would it not be advisable to await the word of the Michigan court in the pending case relating to the Royal Oak No. 7 Drain? Unless it decides the case for bondholders on one of the other grounds mentioned herein, it will have to say whether the drain considered in the Detroit Trust Company case stands as an exception and is ruled by different legal principles, or whether the decision is, as it purports to be, a general inter-

pretation of the statute declaring the kind of a structure authorized thereunder.

Since there is an entire absence of decisive declarations of any Michigan court on any of the subjects dealt with in the Court of Appeals decision, we submit that the policy of this court to prevent federal courts from exercising an independent judgment in matters of local law ought to impel this court to take such action as would preserve the *status quo* in this case, so that the Michigan decision expected within a few months can be given effect.

JOSEPH W. HUTCHINSON,
Deputy Attorney General
State of Indiana.

Office - Supreme Court, U. S.
SEP 5 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL, PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District, Macomb County, Michigan,
Petitioners,

v.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; COUNTY OF MACOMB; CARL B. BRANDENBURG, County Treasurer; GUY L. BROWN, County Clerk; BERT ENGELBRECHT, Drain Commissioner; SHERWOOD BENNETT, Controller; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF ERIN; TOWNSHIP OF LAKE; TOWNSHIP OF WARREN; and ROY F. STOCKWELL, Township Treasurer of Lake Township,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,

BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

INDEX

	Page
Concise Statement of Case	1-7
Argument	7-60
Conclusion	61-62

SUBJECT INDEX OF ARGUMENT

Preliminary Statement	7-9
I. Petitioners' Right to Recovery is Foreclosed by the Decision and Decree of the State Court in the Case of Township of Erin v. Macomb County Drain Commissioner, et al	9-17
(a) Bondholders' Contention That They Had No Notice of the Proceedings in the State Court Is Not Tenable	14
(b) It Is Not the Duty of This Court to Grant Certiorari	15-17
II. The United States Circuit Court of Appeals, Sixth Circuit, Has Not Decided Important Questions of Local Law Probably in Conflict With the Local Statutes and Decisions of the State of Michigan As Contended By Petitioners in the Second Reason Given for Allowance of the Writ	18-53
(a) The Circuit Court of Appeals did not Reject Local Interpretations of the Drain Statute as to the Character of the Improvement that the Drain Commissioner was Authorized to Construct	19-34
1. That even if it be assumed that the decision of the Michigan Supreme Court decreeing the project to be illegal is not *res judicata* as to the petitioners, on the	

Page

record of this case the project was illegal and the proceedings, including the bonds, were void because the project was conceived and constructed not with the primary purpose of furnishing drainage facilities but with the dominant purpose of furnishing sewage facilities..... 19-26

2. The Master, the District Court in Overruling Petitioners' Exceptions to the Master's Report, and the Circuit Court of Appeals were correct in applying the Michigan Supreme Court Decisions to the Record in this case in their final determination that the Michigan Supreme Court has been consistent in its interpretation of the Drain Act, and in its holding that the project is illegal and the proceedings void from their inception 27-34

(b) The Circuit Court of Appeals Was Correct in Its Decision on the Effect of the Recitals in the Bonds..... 35-48

1. Estoppel does not apply to the appellants who did not sign the bonds or make any representations pertaining thereto 35-39

2. Bondholders are not entitled to rely upon recitals in the bonds where the Drain Commissioner was completely lacking in jurisdiction to issue the bonds or to create any legal liability whatsoever in the undertaking..... 39-46

3. The collection of taxes to pay for the illegal projects would violate the due process clauses of Federal and State Constitutions 46-48

Page

(c) The Circuit Court of Appeals Was Correct in Its Holding That Where the Proceedings Are Plainly Null and Void under Michigan Law and That When the Bonds Which Are a Part of the Proceedings are Void, the Tax Officials are not Under a Duty to Proceed to Assess Drain Taxes or to Maintain Drain Funds 48-49

(d) Petitioners' Contention That the Court of Appeals Ignored the Effect of the Statute Prohibiting Collateral Attack on the Drain Proceedings is Without Merit..... 49-51

(e) The Rights of Appellees, if Any, to the Existing Fund for Taxes Paid Cannot Be Determined Upon the Existing Record in this Case, and This Disputed Right Must Be Determined in Separate Proceedings in Which This New Issue Is Submitted and in Which All the Parties in Interest Are Represented 51-53

III. The Decision of the Circuit Court of Appeals in This Case Is Not in Conflict With the Decisions of the Circuit Court of Appeals, Eighth Circuit, or of This Court..... 54-56

IV. Petitioners are not Entitled to Have This Court Withhold Its Decision in This Case Pending the Decision of the Michigan Supreme Court in the Case of Highland Park v. Clark..... 56-60

TABLE OF CASES CITED

Page

American Constr. Co. v. Jacksonville T. & K. W. Ry. Co., 148 U. S. 372, 37 L. Ed. 486..... 7

American Surety Co. v. Baldwin, 287 U. S. 156..... 18

Atherton v. Anderson (CCA, Sixth), 86 Fed. (2d) 518 20

Brooks v. County of Oakland, 268 Mich. 637..... 36

Chase National Bank v. City of Norwalk, 291 U. S. 431 ..... 8, 54

City of Highland Park v. Clark, No. 41690 Michigan Supreme Court 19, 56

Clinton v. Spencer, 250 Mich. 135.....4, 28, 41

Deery's Lessee v. Cray, 18 L. Ed. 653..... 35

Detroit Trust Co. v. Dingman, 291 Mich. 170.....
4, 27, 31, 32, 33

Douglas v. Pike County, 101 U. S. 677..... 50

Erie Rd. Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188 .....9, 10, 17, 20, 41, 50, 56

Fetzer v. Johnson, 15 Fed. (2d) 145.....8, 54, 55

Fuller v. Cockerill, 257 Mich. 35.....4, 47, 50

Godkin v. Rutterbush, 147 Mich. 116..... 13

Hankinson v. Deake, 265 Mich. 1.....23, 24, 28, 40, 41

Hansberry v. Lee, 311 U. S. 32..... 15

Hoad v. Van Wagoner, 278 Mich. 600..... 23

In re Woods, 143 U. S. 202, 36 L. Ed. 125..... 7

Kellogg v. Hicks, 285 U. S. 502, 76 L. Ed. 903..... 8, 20

Kennedy v. Dingman, 272 Mich. 24..... 28, 40

Kersh Lake Drainage District, et al., v. A. J. Johnson, 309 U. S. 485..... 10, 12

Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 61 L. Ed. 712..... 55

Magnum Import Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922 .....7, 8, 15

Page

Meyering Land Co. v. Spencer, 273 Mich. 703..... 4, 23, 29, 33, 40, 49
Municipal Investors Ass'n. v. City of Birmingham, 298 Mich. 314..... 57, 58
New England Mutual Life Ins. Co. v. Mitchell, 118 Fed. (2d) 414..... 18
Nuveen v. Quincy, 156 So. 153 (Fla.)..... 53
Royal Oak Drainage District, et al., v. Keefe, et al., 87 Fed. (2d) 786.....20, 42, 44
Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290 .....9, 55, 56, 61
Spitzer v. Village of Blanchard, 82 Mich. 234..... 44
Texas & N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks, 281 U. S. 548, 74 L. Ed. 1034..... 8, 20
Township of Cooper v. Little, 220 Mich. 62..... 36
Township of Erin v. Macomb County Drain Commissioner, et al., Macomb County Chancery suit No. 8505 ..... 9, 10
Township of Lake v. Millar, 257 Mich. 135..... 4, 10, 39, 41, 49, 59
Village of Oak Park v. Van Wagoner, 271 Mich. 450 41, 47, 48
Virginia Ry. Co. v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789..... 8, 20
West v. American Telephone & Telegraph Co., 311 U. S. 223, 85 L. Ed. 146..... 10, 41
Wuchter v. Pizzutti, 276 U. S. 13..... 14

STATUTES AND AUTHORITIES CITED

	Page
Act 155 of the Public Acts of Michigan for 1937, Sec. 9	57, 58
Act 316 of the Public Acts of 1923, as amended by Section 5, Chapter XVII, Act No. 74, of the Public Acts of 1925	6
Act 331 of the Public Acts of Michigan for 1927	5
Article VIII, Section 15(a) of the Michigan Constitution of 1908	26, 47
Article II, Section 16 of the Michigan Constitution of 1908	46
5 Cyc. of Fed. Procedure, paragraph 2638	7
Fifth Amendment to the United States Constitution	46
Rule 53, Rules of Civil Procedure, Subdivision (e) (2)	20
Section 4927 of the Compiled Laws of Michigan for 1929	51
Section 4936 of the Compiled Laws of Michigan for 1929, Section 14	12
Vol. 3170 of Michigan Supreme Court Records and Briefs, p. 49	32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL, PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District, Macomb County, Michigan,
Petitioners,

v.

MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan; COUNTY OF MACOMB; CARL B. BRANDENBURG, County Treasurer; GUY L. BROWN, County Clerk; BERT ENGELBRECHT, Drain Commissioner; SHERWOOD BENNETT, Controller; BOARD OF SUPERVISORS OF MACOMB COUNTY; TOWNSHIP OF ERIN; TOWNSHIP OF LAKE; TOWNSHIP OF WARREN; and ROY F. STOCKWELL, Township Treasurer of Lake Township,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

CONCISE STATEMENT OF THE CASE

A Writ of Certiorari is sought to review an order of the Circuit Court of Appeals, 119 Fed. (2d) 157, reversing a District Court judgment (R. 172-185), which judgment was entered after overruling exceptions of petitioners (R. 163-166) and respondents (R. 154-162) to a report of a Special Master (R. 98-153). We find it necessary to point out in-

accuracies and omissions in opposing counsel's statement of the case.

This case is one of three cases which involve similar projects and similar legal issues, the testimony of which was taken simultaneously with the testimony in this case, upon which the Master filed a combined report and during the trial of which some exhibits were used in common. Petitions for certiorari have been filed in all three cases, the other two cases being by the same petitioners and in one the Nine Mile-Halfway Drain District, et al., respondents, this Court docket No. 291, and in the other, Centerline Relief Drain District, et al., respondents, this Court docket No. 290. It was stipulated by counsel in the lower court (R. 197-200) that any of the exhibits or testimony in these cases, this Court docket Nos. 291 or 290, would be considered a part of the record in this case and would be referred to in the arguments and briefs. The Circuit Court of Appeals filed a combined opinion on this case and this Court docket Nos. 291 and 290 (R. 643)*

Petitioners excepted to the Master's Report on the ground that the primary purpose of the project was drainage and that the project was a legal project under the applicable laws of the State of Michigan (R. 165) and that petitioners were entitled to the independent judgment of the Federal Court as to the character of the project without regard to the prior adjudication of the Michigan Court (R. 163, 164).

The Circuit Court for the County of Macomb, Michigan, had decreed the entire project and the proceedings to be illegal and void for want of jurisdiction in the Drain Commissioner to do what he attempted to do (R. 23), and the Circuit Court decision was not appealed. The Special Master in an independent finding determined the entire

*NOTE: We respectfully suggest that this court consider first the Nine Mile case, this court Docket No. 291.

proceedings and the project to be illegal and void, and the District Judge in overruling petitioners' exceptions also determined that the proceedings were void for want of jurisdiction. The Circuit Court of Appeals concurred in the findings of the Special Master and the District Court and determined the entire proceedings to be illegal and void under the state law for want of jurisdiction. The Special Master and the District Court held that even though the proceedings were void under the state law for want of jurisdiction in the Drain Commissioner to do what he attempted to do, that respondents were estopped by the recitals in the bonds from denying their validity, and further held that petitioners were not bound by the unappealed from decision of the Circuit Court for the County of Macomb decreeing the entire proceedings illegal and void for want of jurisdiction, because bondholders were not named as party plaintiffs or defendants in the state case. The Circuit Court of Appeals, in reversing the District Court, sustained respondents' defenses and held that respondents were not estopped to deny the validity of the bonds because the Federal Court was bound to follow the state law and that under the state law, the proceedings of which the bonds are a part were void because of lack of jurisdiction in the Drain Commissioner to do what he attempted to do. The Circuit Court of Appeals further found that even if it had not made an independent determination of the illegality of the proceedings and the bonds under the state law, the bondholders had their day in court and were bound by the unappealed from state court decision where the entire proceedings were decreed illegal for want of jurisdiction because under the State and Federal authorities the Drain Commissioner represented the bondholders in the state court proceedings.

On page 4 petitioners state: "Objection to the payment of the bonds and levy of taxes is based upon a claim that

the improvement was designed and built with the intention that it would serve the dual purpose of removing surface water and sanitary sewage, and because of this underlying purpose the Drain Commissioner lacked jurisdiction." The erroneous statement that objection to the payment of the bonds or the defense of the case is based upon a claim that the improvement was designed for a dual purpose, is argumentative and completely disregards the tests of legality consistently applied by the state court and properly applied by the lower court in its opinion (R. 643-656).

The respondents are: The Martin Drain and Branches Drain District, County of Macomb, County Treasurer, Clerk, Drain Commissioner, Controller and Board of Supervisors, the Townships of Erin, Lake and Warren, and Township Treasurer of Lake Township. The Circuit Court of Appeals held that respondents other than the Drain Commissioner were not parties to the recitals in the bonds and could not, under Michigan law, be required to pay for an illegal project.

The statement appearing on page 3 of the petition—"A review of any question involving any step in the proceedings is provided by certiorari, * * *" is not complete without reference to the state court's interpretation of this Michigan statutory law. The state court in *Meyering Land Co. v. Spencer,* 273 Mich. 703, in referring to the necessity for certiorari proceedings stated, on page 709: "The usual claim is made that the proceedings must have been attacked by certiorari. This question has been passed upon by this court in *Clinton v. Spencer, supra; Fuller v. Cockerill,* 257 Mich. 35; and *Township of Lake v. Millar, supra.* I can add nothing to what was said in these cases upon the question of the necessity of resorting to certiorari. It is not necessary where there is no jurisdiction."

Petitioners' statement on page 7 that the lower court refused to consider the case of *Detroit Trust Co. v. Dingman,* 291 Mich. 170, is erroneous, as clearly appears from

record page 648 of the lower court's opinion, and so argumentative that we leave the answer thereto to our argument and objections to the Petition.

The Special Master found (R. 129) "the Martin project in fact was in reality nothing but a small model of the Nine Mile, except that it lacked a treatment plant." No exception was taken to this finding of the Special Master by petitioners. The Special Master found that the existing municipalities did not have separate sewage facilities and the entire area, urban and suburban, was without sanitary sewage facilities (R. 105), and petitioners did not except to this finding. On the trial of the case petitioners produced an engineer as a witness, who testified solely from the plans and specifications that the project was a legal drain (R. 240). These plans and specifications are not included as a part of the record of the proceedings in either Petitioners' Statement of the Case or the Appendix to the Petition, but are admittedly a part of the proceedings and part of records of the Drain Commissioner's office (R. 236, 237). The testimony of the designing and other engineers upon which the Master and the District Court based their findings was that the project and proceedings were designed primarily to furnish sewage facilities (R. 335, 338, 341, 358, 390, 403, 412, 417, 418, 423, 438, 439, 448, 449, 457).

This case differs from the companion Nine Mile case in the one respect that in the lower court the County of Macomb claimed for itself the special defense that it was not estopped to deny the validity of the bonds and could not be required to advance money under Act 331 of the Public Acts of 1927 of the State of Michigan to pay for an illegal project. A material portion of said Act reads as follows:

> "* * * In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due, the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected; Provided, That such advancement shall not cause the total debt of the county to exceed the constitutional limitation thereof."

The Circuit Court of Appeals held that the County of Macomb was correct in this contention (R. 650).

As stated above, the Master filed a combined report and the Circuit Court of Appeals also filed a combined opinion in the companion cases. We therefore, do not repeat all the omissions and errors pointed out in our Statement of the Case in this Court Docket No. 291, but do repeat that the lower court settled purely local controversies involving the application of the Michigan decisions to determine the jurisdiction of the Drain Commissioner and the validity of proceedings by the Drain Commissioner which purport to be under Act 316 of the Public Acts of 1923, as amended (a portion of which is attached as an appendix to the Petition).

We have recited only sufficient facts to show some of the inaccuracies and omissions of petitioners' statement of the case. These more fully appear in our Argument (pages 7 to 60) and we will not repeat them here.

ARGUMENT

PRELIMINARY STATEMENT

We respectfully submit that the reasons relied upon by petitioners for the allowance of the Writ of Certiorari do not entitle them to the Writ.

1. Petitioners state as their first reason for the allowance of the Writ that due process is denied petitioners by the decision of the Circuit Court of Appeals holding that the decrees in taxpayers' suits in the state courts are *res judicata*. This question was fully briefed and argued by both sides in the Circuit Court of Appeals. This is not a case where a state statute or a state court decision is claimed to have deprived bondholders of their right to due process under the Federal Constitution, but a case where petitioners claim that they have been denied due process of law by the decision of the Federal Circuit Court of Appeals, which held that the bondholders have had their day in court and that the state court decisions are *res judicata*.

The discretion of this Court in granting Writs of Certiorari is exercised sparingly and with caution. *Amer. Constr. Co. v. Jacksonville T. & K. W. Ry. Co.*, 148 U. S. 372, 37 L. Ed. 486; *In re Woods*, 143 U. S. 202, 36 L. Ed. 125. We respectfully submit that the petition for certiorari in this case amounts to a request for a rehearing of the issues already decided by the Circuit Court of Appeals and that petitioners are not entitled to such rehearing. In *5 Cyc. of Fed. Procedure*, paragraph 2638, it is stated:

> "It is clear that the writ will not issue merely to give the defeated party in the Circuit Court of Appeals another hearing nor to review evidence on mere questions of fact." *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. Ed. 922.

2. Petitioners state as their second reason for the allowance of the Writ that the Circuit Court of Appeals did not decide issues in accordance with local law. Petitioners themselves admit on page 43 of their Brief that this reason is not a proper one for the allowance of the Writ. Suffice it to say, therefore, that the issues of local law decided by the Circuit Court of Appeals were all fully briefed and argued by petitioners in the lower court and that said issues were decided by the Circuit Court of Appeals in accordance with local law. It now appears that petitioners are seeking a rehearing upon the decision of the Circuit Court of Appeals pertaining to issues of local law, and this rehearing they are not entitled to. *Magnum Import Co. v. Coty, supra.* It has been repeatedly held that on a question of fact the Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals when supported by substantial evidence. *Kellogg v. Hicks,* 285 U. S. 502, 76 L. Ed. 903; *Texas and N. O. R. Co. v. Brotherhood of Ry. and Steamship Clerks,* 281 U. S. 548, 74 L. Ed. 1034, and *Virginia Ry. Co. v. System Federation No. 40,* 300 U. S. 515, 81 L. Ed. 789.

3. The Circuit Court of Appeals has not decided the question of the power of Federal Courts to restrain action to enforce actions of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in *Fetzer v. Johnson,* 15 Fed. (2d) 145, or in conflict with the decision of this Court in *Chase National Bank v. City of Norwalk,* 291 U. S. 431. In the case at bar the Circuit Court of Appeals did not decide that if the bonds were for any reason held to be valid that the injunction of the state courts enjoining the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other, as may be readily seen from an examination of the Opinion

of the Circuit Court of Appeals. Moreover, the contention of petitioners on this point is controlled by the decisions in the case of *Erie Rd. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, and in *Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, in which latter case this Court held:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

I.

PETITIONERS' RIGHT TO RECOVERY IS FORECLOSED BY THE DECISION AND DECREE OF THE STATE COURT IN THE CASE OF TOWNSHIP OF ERIN v. MACOMB COUNTY DRAIN COMMISSIONER, ET AL.

In the case of *Township of Erin v. Macomb County Drain Commissioner, et al.,* Macomb County Chancery suit No. 8505, the Circuit Court after having passed upon the same proceedings now under consideration by this Court, decreed as follows (R. 23):

> "It Is Ordered, Adjudged and Decreed:
>
> That all proceedings and actions heretofore taken by the defendants as set forth in the bill of complaint filed in this cause, relative to the survey, location, establishment and construction of the Martin Drain, the extension of the outlet thereof, and all apportionments and assessments made thereon, against the plaintiffs and the lands of said plaintiff, are decreed to be illegal, unlawful, null and void, and of no effect whatsoever, and said apportionments and assessments be and are hereby cancelled, vacated and set aside, and the said lands of plaintiffs be and are hereby forever discharged of and from the apparent lien thereof."

With reference to the binding effect of this decision on the Federal Courts the Circuit Court of Appeals properly held that the decrees in the State cases "construing as they do the Michigan County Drain Law, are binding upon this Court. Rulings of State Courts construing state statutes were binding upon Federal Courts prior to the announcement of *Erie Railroad Company v. Tompkins,* 304 U. S. 64. Certainly since that decision the Federal Courts are governed by state law to a greater extent than formerly. • • •"

Under the decision in the case of *West v. American Telephone & Telegraph Co.,* 311 U. S. 223, 85 L. Ed. 146, the unappealed from decision of the Macomb Circuit Court with reference to these proceedings is just as binding upon this Court as if it were the decision of the Michigan Supreme Court. It is unreasonable to believe that the Supreme Court of Michigan would have reversed the decision of the Macomb Circuit Court, especially in view of the Supreme Court's decision in the case of *Township of Lake v. Millar,* 257 Mich. 135, because the subject matter in both cases is practically identical. The fact that the proceedings are practically identical is borne out by the statement of the Master in this case, who held:

> "The Martin project in fact was in reality nothing but a small model of the Nine Mile, except that it lacked a treatment plant" (R. 129).

The present contention of Petitioners is that the bondholders are deprived of due process by the decision of the Circuit Court of Appeals holding that the decision of the Circuit Court of Macomb County in the case of *Township of Erin v. Macomb County Drain Commissioners* is *res judicata* of the rights of the bondholders.

The legal issue involved has been clarified by *Kersh Lake Drainage District, et al., v. A. J. Johnson,* 309 U. S. 485,

and by the decision of the Circuit Court of Appeals in this case. The important point decided in the Kersh Lake case is that under very similar circumstances and statutes it has been held by this Court that the Drain Commissioners do represent the bondholders. In the Kersh Lake case the Court stated:

> "As stated by the Supreme Court of Arkansas, the general jurisdiction of the Lincoln Chancery Court, under the State law, to render the 1931 and 1932 decrees is 'acknowledged,' and this determination by the State's highest court is binding upon us. However, petitioners' argument is that these decrees were void because certificate holders were not made parties in and had no notice of the chancery proceedings. Therefore, they contend that in giving effect to the State court decrees and treating them as *res judicata* in the present proceeding the court below deprived certificate holders of their property without due process of law in violation of the Fourteenth Amendment. Petitioners also add the contention that the 1932 State court decree was 'collusive as a matter of law.'
>
> "Although the Drainage District was not in terms legislatively declared to be a corporation, its powers and limitations were similar to those of corporations and its Commissioners were comparable to corporate directors. Among the duties of the Commissioners—as provided by the very statute upon which the certificates involved here rest—were those of protecting and enforcing creditors' rights on obligations issued by the District. And the Commissioners in 1931 and 1932 litigated with the landowners the disputed question of proportionate amounts of the taxes due the District by virtue of drainage benefits received by the particular tracts here in question.
>
> • • • • •

"These certificate holders were not entitled to be made parties in the Lincoln Chancery proceedings just as in practice creditors of a corporation are not, unless otherwise provided by statute, made parties in a suit between a stockholder and the corporation to determine liability on a stock subscription, between the corporation and a third person to recover corporate assets, or in a suit brought against the corporation by creditors, stockholders or officers. It has been held that bondholders are not necessary parties to and are bound by the decree—even if adverse to their interests—in litigation wherein an indenture trustee under a bond issue is a party and exercises in good faith and without neglect his contractual authority to represent and assert the lien securing the issue. And so are these petitioners bound by the decrees in the Chancery suit in which the Commissioners as parties appropriately asserted the lien for benefit of certificate holders—unless there was fraud or collusion.

"It is sufficient to state as to this contention that the issues of fraud and collusion raise no questions which the Supreme Court of Arkansas was not competent finally to decide."

In connection with the language used in the Kersh Lake case by this court it will be noted that the Circuit Court of Appeals held that the drain district in this case is a corporation (R. 645-646).

It is apparent that a duty similar to that imposed on the Arkansas Drain Commissioners is imposed upon the Drain Commissioners in Michigan where Section 4936 of the Compiled Laws of Michigan for 1929 provides as follows:

"Commissioner party to suit. Sec. 14. In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceed-

> ings, the Commissioner shall be made a party to said suit."

The Michigan Supreme Court has definitely held that the drain commissioner stands as a representative of those who are interested in the drain and collection of the tax, in *Godkin v. Rutterbush,* 147 Mich. 116, where it is stated with reference to the statutory provision quoted above:

> "The obvious reason for the enactment of this provision was that the drain commissioner in a peculiar sense stands as a representative of those who are interested in the drain and in the collection of the tax. The purpose of the statute was to afford to the drain commissioner the opportunity to be heard in the proceeding."

On this point the Circuit Court of Appeals held:

> "There is no essential difference between the statutes of Arkansas and Michigan dealing with this situation. Neither statute provides that the creditors or bondholders shall be made party, the Michigan statute requiring only that in any suit brought to set aside any drain tax or in any way attacking the legality of any drain proceedings, the drain commissioner shall be joined as party to the suit (Section 14, c. 10, Act 316, Michigan Public Acts, 1923). In the Kersh Lake case, *supra,* the Supreme Court pointed out that the Arkansas statute contemplated 'that the commissioners should represent the collective and corporate interests of the district in litigation between the district and a landowner involving matters personal to the landowner.' The Supreme Court of Michigan has held that 'The drain commissioner in a peculiar sense stands as the representative of those who are interested in the drain and in the collection of the tax.' *Godkin v. Rutterbush,* 147 Mich. 116. This holding makes the Kersh Lake case squarely applicable to the instant case."

We respectfully submit that a proper interpretation of the recent United States Supreme Court decision in the Kersh Lake Drainage District case settles all the issues in controversy here and was authority for the holding of the Circuit Court of Appeals that the decision of the State Court with reference to this particular project is *res judicata* as to the petitioners herein.

(a) Bondholders' Contention That They Had No Notice of the Proceedings in the State Court Is Not Tenable.

This contention was overruled by the Circuit Court of Appeals in this case and a similar contention was overruled by this Court in the Kersh Lake case. In the Kersh Lake case this Court held that the bondholders were not entitled to be made parties and that they were bound by the Decree of the State Court, even though they received no personal notice of the action in the State Court, because their interests were represented by the Drain Commissioner.

The case of *Wuchter v. Pizzutti,* 276 U. S. 13, is not applicable to the case at bar. The Wuchter case involves the validity of a statute of New Jersey providing for service of process on non-residents of the State in suits for injury by the negligent operation of automobiles on its highways. The distinguishing feature is that under the statute considered in the Wuchter case the service is made by leaving the Summons with the Secretary of State. The Secretary of State is not made a party to the suit and in no sense stands as the representative of the non-resident motorist at the trial of the cause, so that obviously a means of notifying the non-resident is required; but in the present situation the Drain Commissioner is made a party to the suit and does stand as a representative of the bondholders.

(b) It Is Not the Duty of This Court to Grant Certiorari.

Petitioners ask for certiorari on the allegation that they have been denied due process of law by the decision of the Circuit Court of Appeals. The Circuit Court of Appeals held that the bondholders are bound by the decision of the State Court in an action by taxpayers against the Drain Commissioner, et al., attacking the validity of the drain proceedings and seeking a permanent injunction against the levy and collection of taxes, when the interests of the bondholders and others interested in the drain and the collection of the tax are represented by the Drain Commissioner.

Petitioners are not entitled to certiorari based upon the allegations in their Petition, because--

(a) The question of the binding effect of the State Court decision on the bondholders has already been fully briefed, argued and decided by three competent Judges of the Sixth Circuit Court of Appeals, and it was held by the said Circuit Court of Appeals that under the authority of the Kersh Lake case, *supra,* decided by this Court, that the decision of the Macomb Circuit Court on this project is binding upon the petitioners herein. The Circuit Court of Appeals further stated that "there is no essential difference between the statutes of Arkansas (determinative of the Kersh Lake case) and Michigan dealing with this situation." Under the above circumstances there is no duty upon this Court to review the decision of the Circuit Court of Appeals which has already passed upon the contention now urged before this Court. *Magnum Import Co. v. Coty,* 262 U. S. 159, 67 L. Ed. 922.

(b) Moreover, the case of *Hansberry v. Lee,* 311 U. S. 32, is not applicable here because in that case it was the

decision of the State Court which, it was claimed, was in violation of the due process clause of the Federal Constitution, and the question of whether the said State Court decision violated the due process clause of the Federal Constitution had not been passed upon by a Federal Court and under those circumstances this Court very properly granted certiorari.

(c) The question of whether or not the lower court erred in holding that Petitioners are bound by the decision of the State Court need not be decided by this Court be cause the decision of the Circuit Court of Appeals would have been the same regardless of its holding on the *res judicata* question.

The first point decided by the Circuit Court of Appeals was that the recitals in the bonds do not estop the taxpayers, townships or municipalities or the County from raising the defense that the particular projects were constructed wholly without authority, and that the projects and all the proceedings thereunder, including the bonds which were issued as a part of the proceedings, are void. This point was decided on the well known principle of law that there can be no estoppel by recitals against parties who did not join in the recitals, and in this case the recitals were executed only by the Drain Commissioner on behalf of the Drainage District so that no party, with the exception of the Drainage District, could possibly have been bound by the said recitals.

The second point decided by the Circuit Court of Appeals was that not even the Drain Districts were estopped by the recitals in the bonds because it is the law of Michigan that where the Drain Commissioner is completely lacking in jurisdiction the proceedings are illegal and void and bonds issued to defray the expense of such proceedings are void in the hands of innocent holders since there can

be no estoppel when there is a complete lack of jurisdiction. The Circuit Court of Appeals further held that the Federal Courts are bound to follow the law of Michigan under the rule stated in *Erie Railroad Co. v. Tompkins (supra).*

So it is clear that regardless of the decision that the Circuit Court of Appeals came to on the question of whether the bondholders were represented by the Drain Commissioner and were bound by the Michigan decisions on these projects, the decision would still be that the Federal Courts must follow the Michigan decisions holding that where the Drain Commissioner built a sewer he was without jurisdiction, that the proceedings were void, that the taxpayers, townships, municipalities, counties and Drain Districts were not estopped by the recitals in the bonds and that where there is a total lack of power, the bonds issued as a part of the proceedings are void.

We, therefore, respectfully submit that this Court should not grant certiorari to review a question which has already been fully considered and decided against Petitioners by the Circuit Court of Appeals and which, even if it were decided in favor of Petitioners, would not change the decision of the Circuit Court of Appeals in its holding that the bonds are void.

II.

THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT, HAS NOT DECIDED IMPORTANT QUESTIONS OF LOCAL LAW PROBABLY IN CONFLICT WITH THE LOCAL STATUTES AND DECISIONS OF THE STATE OF MICHIGAN, AS CONTENDED BY PETITIONERS IN THE SECOND REASON GIVEN FOR ALLOWANCE OF THE WRIT

At the outset of our reply to the second section of petitioners' Brief, we wish to point out that the cases of *New England Mutual Life Insurance Company v. Mitchell,* 118 Fed. (2d) 414, and *American Surety Company v. Baldwin,* 287 U. S. 156, cited on pages 24 and 25 of petitioners' Brief, are not applicable to the facts in this case. The quotation from the New England Mutual Life Insurance Company case applies to a situation where a federal court is called upon to make a decision on a local matter "where there has been no decision on the precise question" by the state court, but the Michigan courts have repeatedly passed upon the questions now before this Court. On the question of the validity of the bonds the Circuit Court of Appeals held (R. 653):

> "While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders, and this law we follow."

The American Surety Company case, *supra,* cited by petitioners, is not applicable here because the facts are different. In that case the United States Supreme Court withheld action on a petition for a writ of certiorari pend-

ing the action of the Supreme Court of Idaho with reference to actions involving the same parties and the same subject matter. It appears that if the Idaho Supreme Court had granted the relief sought by the American Surety Company there would have been no need for the United States Supreme Court to issue the writ of certiorari, so in that case this Court properly withheld action upon the petition for the issuance of the writ until the American Surety Company had exhausted its remedy in the state court.

Petitioners' contention that this Court should withhold action upon the Petition for a Writ of Certiorari pending the outcome of the case of *City of Highland Park v. Clark*, No. 41,690 Michigan Supreme Court, is answered on pages 56 to 60 of this Brief.

(a) THE CIRCUIT COURT OF APPEALS DID NOT REJECT LOCAL INTERPRETATIONS OF THE DRAIN STATUTE AS TO THE CHARACTER OF THE IMPROVEMENT THAT THE DRAIN COMMISSIONER WAS AUTHORIZED TO CONSTRUCT.

Our reply to paragraph (a) of the second reason given by petitioners divides itself into two points:

1. **That even if it be assumed that the decision of the State Court decreeing the project to be illegal is not res judicata as to the petitioners, on the record of this case the project was illegal and the proceedings, including the bonds, were void because the project was conceived and constructed not with the primary purpose of furnishing drainage facilities but with the dominant purpose of furnishing sewage facilities.**

The Circuit Court of Appeals properly held that the findings of the Special Master, as confirmed by the District Court, determining the Martin project and the proceedings

pertaining thereto to be illegal and void, should not be overruled unless clearly erroneous.

Rule 53, Rules of Civil Procedure, Subdivision (e) (2),
Atherton v. Anderson (C. C. A. 6th), 86 Fed. (2d) 518.

It has been repeatedly held that on a question of fact the United States Supreme Court will accept the concurrent findings of the District Court and the Circuit Court of Appeals supported by substantial evidence.

Kellogg v. Hicks, 285 U. S. 502, 76 L. Ed. 903;
Texas and N. O. R. Co. v. Brotherhood of Railroad and Steamship Clerks, 281 U. S. 548, 74 L. Ed. 1934;
Va. Ry. Co. v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789.

The decisions of this Court following *Erie Railroad Company v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, make it unnecessary for Respondents to enlarge upon the established law that the Federal Courts must follow the decisions of the State Court in interpreting the drainage statute and the limits of the jurisdiction of the Drain Commissioner. The Circuit Court of Appeals of the Sixth Circuit in the case of *Royal Oak Drain District, et al. v. Keefe, et al.,* 87 Fed. (2d) 786, in which case counsel for Petitioners herein represented the bondholders, had occasion to interpret the Michigan statutes and determine the jurisdiction of the Drain Commissioner and in so doing properly applied the tests of legality and limits of jurisdiction used by the Michigan Supreme Court in interpreting the Michigan drain statutes and the jurisdiction of the Drain Commissioner.

In the Royal Oak case the Circuit Court of Appeals determined the project to be a legal drain, constructed through legal proceedings. In applying the tests of Michigan law which the Circuit Court of Appeals used in the Royal Oak case to the present case, we find:

1. That the ditches were adequate for surface drainage for the existing population and would be for some time in the future (R. 336, 345, 403, 411, 443, 444, 462).

2. There were no low or marshy or water-logged areas (R. 334, 336, 339, 403, 462, 465).

3. The open drains were not neglected as the territory become urbanized, except for the sewage nuisance.

4. The existing municipalities did not have separate sewage facilities. (M. R. 105)*

5. The entire area, urban and suburban, was without sanitary sewage facilities. (M. R. 105)*

6. The depth was sufficient to furnish sewage facilities to the entire assessment district (R. 335, 339, 349).

7. The inescapable conclusion is that "much of the impetus" to the project and, in fact, the primary purpose of the design and construction thereof was sewage disposal (R. 345, 346, 349, 361, 362, 364, 412, 439, 440, 449, 463, 464, 480, 481). (M. R. 125)*

8. The Macomb County Circuit Court had decreed the project to be a sewer and this decree was not appealed from. (M. R. 101)*

9. The undisputed testimony is that if the sewage was eliminated from the ditches, the existing nuisances and health menaces would likewise be eliminated. In other

*M. R. refers to Master's Report.

words, the problem was sewage disposal (R. 345, 346, 349, 361, 362, 364, 411, 440, 463, 464, 480, 481).

The Master recognized some of the foregoing distinctions when he found (R. 119):

> "The evidence is also distinguishable from that in the Royal Oak case, where the Circuit Court of Appeals held the dominant purpose of the project to be drainage in several fundamental respects: (1) The natural drainage in the Royal Oak District was decidedly poorer, there being several marshy areas, chief of which was the large Hubbard swamp, the desire to eliminate which was a primary factor in the initiation of the project. (2) The designing engineers of the Royal Oak Drain testified that they intended the project to function primarily as a drain, and persistently so represented to the Drain Commissioner at the time; while here the designing engineer testified the intention from the beginning was to furnish complete service to the community. (3) The Royal Oak Drain took in sewage from only part of the district, other parts being already served by village or city sewer systems; while here there were no other outlets for sewage except the open drains. (4) There was no treatment plant in connection with the Royal Oak Drain. (5) The structure in the Royal Oak case appears to have been considerably shallower than here and not to have afforded basement drainage to all parts of the district where it would have been possible so to provide."

In addition to the tests which this Court applied in coming to its decision in the Royal Oak case, this question must be construed in favor of appellants because of the following undisputed facts:

1. The project, as designed, was a closed conduit deep enough underground at the upper end and throughout the

assessment district so that laterals could be constructed to furnish sewage facilities, at basement levels, for the entire assessment area, which construction is essential for sewage purposes and is not essential for surface drainage purposes (R. 335, 339, 349).

2. The joints in the project were closed to prevent land drainage and to prevent the seepage of sewage, and the Michigan Supreme Court in the cases—*Meyering Land Company v. Spencer,* 273 Mich. 703; *Hankinson v. Deake,* 265 Mich. 1, and *Hoad v. VanWagoner,* 278 Mich. 600, and in other decisions gave material consideration to whether or not the joints were open or closed in determining, as is stated in the Meyering case, whether they were constructed primarily for the purposes of land drainage, or for sewage purposes (R. 350).

3. The project was designed and built so that the laterals would follow streets for sewage purposes. The Michigan Supreme Court attached significant imporatnce to this in the Meyering case and other decisions showing the purpose to be to furnish sewage facilities. The undisputed testimony in this case is that connections were made by individuals without the consent of the municipalities and with the consent of the Drain Commissioner as soon as the project was available for use and that a large number of permits in this case have been issued by the Drain Commissioner's office to individuals for sewage use (R. 328, 331, 332, 334, 337, 340, 455).

4. The plans, specifications and records of the proceedings frequently call this project a "sewer" and in various places plainly indicate that it was to be used for sewage disposal, and anyone examining the same should have known that the primary purpose was sewage disposal (R. 248, 249, 285-287, 335, 338-340, 342, 355-358, 385, 408, 409, 418, 438, 439, 471).

5. Design and use of the project was primarily for the disposal of raw sewage without the septic treatment referred to in *Hankinson v. Deake,* 261 Mich. 1.

6. The catch basins and drop manholes as designed and constructed are an essential characteristic of a sewer to eliminate odors and not an essential characteristic of a drain (R. 338, 340, 342, 350, 387, 400, 408, 418, 420, 439, 449). (M. R. 124)*

7. The projected sewage treatment of this project is an essential characteristic of a sewer. (M. R. 126)*

8. From the plans themselves, it is an obvious conclusion that laterals for use must be constructed if benefits were to be had for assessments made (R. 341, 350, 351, 366, 451). (M. R. 125)*

9. The testimony of the engineer designing the Martin project and the supporting testimony of other engineers on this project is that the project was designed primarily for sewage facilities (R. 335, 338, 341, 358, 390, 403, 412, 417, 418, 423, 438, 439, 448, 449, 457).

10. Considering future needs, the project was large enough to furnish sewage facilities for any contemplated increase in population within the assessment area, but not large enough to furnish drainage facilities were the assessment area to become an urban or suburban area (R. 381, 383, 384, 391, 392, 444, 445, 449, 482).

11. There can be no economic justification for the building of the project in this district where the dominant purpose is drainage (R. 352, 389, 391, 411, 431, 432, 439, 440).

12. The projects built in the adjoining Detroit area were constructed as sewers by the City of Detroit under

*M. R. refers to Master's Report.

the statutes authorizing the construction of sewers and not by the Drain Commissioner. This adjoining Detroit area, at the time, had the same population and the same needs and the projects were constructed for a similar purpose, that is, first to furnish sewage facilities and, second, incidentally, for drainage purposes (R. 408-411, 418, 439).

13. The primary purpose of sewage disposal is further shown by the Master Plan for sewage disposal. The primary purpose of sewage disposal was discussed with the consulting engineer of Professor Hoad's engineering firm and the report of this engineering firm introduced in evidence as Exhibit A-4 (R. 295-302) and letter of transmittal dated August 10, 1927 (R. 257), is further proof of this primary purpose (R. 302, 303, 308, 309, 311, 312, 372, 373, 408, 439). (M. R. 130)*

14. The primary use of the project has been to furnish sewage facilities. The presumption is that the use of a given project will be consistent with its primary purpose. The Michigan Supreme Court has frequently referred to other sanitary sewage facilities available, the house connections made in a project, the use or non-use of septic tanks and other matters of use in determining the primary purpose of projects to be sewers or drains. From the plans themselves it is an obvious conclusion that laterals for use must be constructed if benefits were to be had for assessments made. The undisputed testimony is that laterals have been constructed as the existing population was able to pay for sewage facilities. There is an absence of testimony to the effect that laterals were ever constructed to furnish drainage. The undisputed testimony is that the project was used for sewage disposal while still in the process of construction and has been so used since construction (R. 328, 331, 332, 334, 337, 340, 341, 366, 451, 468, 469).

*M. R. refers to Master's Report.

15. The inspection of the sewage disposal plant, the outlets into the lake, the interior of the main conduits made through entry through manholes, the type of construction of existing and projected homes for people in low income brackets and a general inspection of the district, as made by the Master accompanied by counsel, leads to the irresistible conclusion that the primary purpose of the project was the furnishing of sewage facilities to the entire district.

16. The testimony is that the Drain Commissioner and the designing engineer had received legal opinion to the effect that they could build a sewer under the Drain Law and in the contracts, a part of the record of the proceedings, a drain was defined to include a sewer as follows:

> "Drain—Any ditch, tile, drain, sewer, or any other interpretation of the word 'drain' as described in Chapter I, Section 2, of Public Act No. 316, of the State, and any acts amendatory thereof" (R. 283, 315, 357, 368, 369, 370, 371, 389, 391).

The Michigan Supreme Court in all its decisions had to interpret the drainage statutes so as not to do violence to Article VIII, Section 15a, of the Michigan Constitution of 1908, which reads:

> "Any drainage district, established under provision of law, may issue bonds for drainage purposes within such district."

2. The Master, the District Court in Overruling Petitioners' Exceptions to the Master's Report, and the Circuit Court of Appeals Were Correct in Applying the Michigan Supreme Court Decisions to the Record in This Case in Their Final Determination That the Michigan Supreme Court Has Been Consistent in Its Interpretation of the Drain Act, and in Its Holding That the Project Is Illegal and the Proceedings Void From Their Inception.

Petitioners when confronted with the decisions of the Michigan Supreme Court, the decision of the Circuit Court of Appeals and respondents' unanswerable contentions, now resort to the one argument that the legality of the bonds must be determined solely from an examination of a portion of the proceedings. They attempt to support this position by an analysis of the *Detroit Trust Company v. Dingman,* claiming, as set forth in the Statement of Facts of their Petition, page 10, that the Circuit Court of Appeals did not properly consider the Detroit Trust Company case, and further, that the Michigan Supreme Court has not been consistent in following out its original interpretation of the Drain Act. There can be no dispute about the fact that the bonds are issued as a part of the proceedings, and petitioners in their statement of the case, page 3 of the Petition for Certiorari, so state. They refuse, however, to recognize the established law of the State of Michigan that the legality of the proceedings and the project constructed must be determined from a combination of circumstances and conditions, of which the proceedings are a part, and that the State Court has consistently held that where the Drain Commissioner exceeded his jurisdiction proceedings are void from their inception. We shall presently show that petitioners are wrong in their interpretation of the Detroit Trust Company case and that the Michigan Supreme Court has been consistent in interpreting the Drain Act and the jurisdiction of the Drain Commissioner.

In referring to *Clinton v. Spencer,* 250 Mich. 135, as the leading Michigan Supreme Court case, the Master held (R. 168):

> "The Supreme Court has been consistent in following out its original interpretation of the Drain Act in subsequent cases, although because of the inevitable difficulty of weighing purposes in a combined structure the distinction between legal and illegal projects has at times become very fine."

In the Township of Lake case the court held that the extent of the authority of the drain commissioner was measured by the statute from which he derived his authority and not from his own acts and assumptions of authority. This case has frequently been cited as authority by the Michigan Supreme Court and the Detroit Trust Company case has not changed the State Court's reference to it as precedent. In the Detroit Trust Company case the State Court stated that its decision came within the same Court's decision in *Hankinson v. Deake,* 265 Mich. 1, and *Kennedy v. Dingman,* 272 Mich. 24, and we cite these and other Michigan cases as a complete answer to petitioners' contention that the holdings of the Michigan Supreme Court no longer support respondents' contention. In *Hankinson v. Deake,* 265 Mich. 1, the State Court held, page 7:

> *"If the structure is a sewer, the drain commissioner was absolutely devoid of jurisdiction in the premises and the entire proceedings were a nullity and subject to attack by the methods employed herein. Township of Lake v. Millar,* 257 Mich. 135." (Italics ours.)

In *Kennedy v. Dingman,* 272 Mich. 24, the Court said, on Page 27:

> "The LeBlanc drain is less like a sewer than the project involved in *Township of Lake v. Millar,* be-

cause it has no pumping station or filtration plant connected with it, but it is also more like a sewer than the project involved in *Hankinson v. Deake,* because it is monolithic construction without porous joints."

On Page 30, the Court stated:

> "In the case of the *Township of Lake v. Millar, supra,* as stated in the opinion, a sewer was built about 7½ miles long, in places 35 feet below the surface, with a circular concrete barrel ranging from 6 to 11 feet in diameter, and with a purifying plant for sewage treatment in connection therewith. *The record shows that the main and primary purpose was the construction of a drain and not a sewer, although in a few instances the latter use might become incidental."* (Italics ours.)

In *Meyering Land Co. v. Spencer,* 273 Mich. 703, on page 708, the Court said:

> "If a sewer was constructed in pursuance of a petition for a drain, the drain commissioner was without jurisdiction to establish it. *Clinton v. Spencer, supra; Township of Lake v. Millar, supra."*

This case is similar to the companion Nine Mile case before this Court, Docket No. 291, and in referring to the Nine Mile project the Sixth Circuit Court of Appeals held in the Royal Oak case, *supra,* that the Nine Mile project was a sewer and not a drain, as follows:

> "Doubt as to the legality of the proceedings was first entertained after the Michigan Supreme Court on March 7, 1930, in *Clinton v. Spencer,* 250 Mich. 135, invalidated assessments and enjoined the collection of taxes for the construction of the Southfield Drain. This was a large underground sewer entirely independent of any other drainage project, and its construction was held not authorized by the

> drain law. There followed *Kinner v. Spencer,* 257 Mich. 143, a decision to the same effect in respect to assessments for the identical project. Meanwhile, in *Township of Lake v. Millar,* 257 Mich. 135, the court enjoined assessment and collection of taxes for a project in Macomb County for the maintenance of a drain disposal plant, filtration beds and purification plant, which clearly marked the enterprise there as a sewer."

We submit that the Michigan Supreme Court was consistent in following out its interpretation of the Drain Act in the Detroit Trust Company case, and that this case is to be distinguished on the following grounds:

1. The drain commissioner testified and the record discloses that the primary purpose was drainage and that the furnishing of sewage facilities was incidental, whereas in this case the record, including the testimony of the designing engineer and other engineers, discloses that the primary purpose was to furnish sewage facilities and that drainage was incidental. Complete answer to petitioners' contention that the legality of the proceedings, of which the bonds are a part, must, under Michigan law, be determined from an examination of the proceedings only, is found in the Detroit Trust Company case where the Michigan Supreme Court gave sufficient consideration to the testimony of the Drain Commissioner, who was an engineer, as to the purpose of the project to quote such testimony in its opinion on Page 176, as follows:

> "Q. Were you building this structure there to take their sewage, or to take their surface water; which?
>
> A. It was to take the surface water, the storm water, and the subsurface water, *and incidentally, the sanitary.* (Italics ours.)
>
> • • • • •
>
> Q. Would you say, in your opinion as an engineer, that the size of the filtration basin and

> septic tank would indicate that the disposal of sewage was incidental to the structure as a whole?
> A. Yes."

A study of the Detroit Trust Company case leads to the conclusion that the Michigan Supreme Court determined that there was an urgent need for drainage, and everyone connected with the construction of the project know from the outset that the sewage factor would be incidental to the drainage and the Drain Commissioner so testified.

2. The State Court held in this case that the project was a sewer and that the dominant purpose was to furnish sewage facilities, and the same court held in the Detroit Trust Company case that the dominant purpose was drainage and that the furnishing of sewage facilities was incidental.

3. The record in the Detroit Trust Company case discloses that the project was part of a general plan for drainage and that the existing drainage was not adequate, whereas in this case the record discloses that the drainage was adequate and the project was part of a master plan for sewage disposal.

4. It is important to note that the Michigan Court in the Detroit Trust Company case considered how the project was used after construction in determining its purpose, the Court stating on page 177:

> "That this structure is in fact *effectively used* as a means of underground drainage for this district is indicated by the following testimony given by one of plaintiffs' witnesses who all his life had lived on Grosse Ile and at the time was highway commissioner." (Italics ours.)

5. The record in the Detroit Trust Company case discloses that a portion of the area had sanitary sewage

facilities before the project was planned, whereas in this case the entire assessment area was without sanitary sewage facilities.

6. The *Michigan Supreme Court Records and Briefs,* Volume 3170, substantiate our position as to distinguishing features of *Detroit Trust Company v. Dingman.* We quote from Page 49 of the brief of counsel for defendants and appellants:

> "The case of *Township of Lake v. Millar,* 257 Mich. 135, and decided March 2, 1932, was also an action to enjoin the assessment and collection of taxes for a project known as 'Nine Mile Half Way Drain' situated in Macomb County. From a perusal of the case and the type of the structure, and the prominence of a sewage disposal plant the court said, in substance, in its determination: in enjoining the assessment and collection of taxes, that the sewage disposal plant, filtration beds and purification plants clearly mark the enterprise in the *Township of Lake v. Millar* as a sewer, and the similarity of the structure as compared to the project involved in the case of *Clinton v. Spencer, supra,* whereas, in the instant case there are no filtration beds, nor is there a sewage disposal plant. There is, however, a small diversion chamber and septic tank negligible in size which the record discloses was built for the purpose of providing for the incidental need of such sewage as would be carried off by this drain.
>
> "In the Lake Township case the court said that the drain in question was similar to the drain involved in the *Clinton v. Spencer* case. It certainly cannot be said that the structure in the *Clinton v. Spencer* case and the Lake Township case and the attendant circumstances pertaining thereto are in any way comparable with Grosse Ile Tile Drain No. 4 as to their physical construction."

Again, in distinguishing the *Meyering Land Company* case, 273 Mich. 703, the brief states on Page 58:

> In the case at bar, however, the record shows that there was a need for drainage, and that a plan had been formulated for the draining of the whole of the Island of Grosse Ile, and that drains one, two, three, eight and nine were constructed for the purpose of drainage, and that as a part of the originally formulated plan, Grosse Ile Tile Drain No. 4 was added to and became a part of the Drain Commissioner's plan for providing drainage for the Island of Grosse Ile (Ex. No. 3). The necessity for the drainage is clearly indicated in the forepart of this brief where it shows that the roads were in a bad condition; that there were low spots on the island, and that it was impossible for the citizens of the community to send their children to school. The record further shows not only these circumstances as indicating the necessity for drainage on the Island of Grosse Ile, but also the very minutes of the Township meetings relating to this particular area, evidenced the necessity and their desire for proper drainage in this particular community, and that the conditions were so acute that funds were appropriated for the purpose of defraying the cost of a survey of this particular area relative to drainage."

In the Detroit Trust Company case the court states the controlling question is whether the construction involved in this case was in good faith laid out and built as a drain or whether it in fact was conceived and constructed as a sanitary sewer. Applying this test to this case leads to the one conclusion that the project was not in good faith laid out and built as a drain but was conceived and constructed with the dominant purpose of furnishing sewage facilities.

1. The project is a closed conduit constructed of monolithic concrete deep underground and is not one which could be enlarged or widened and even the cleaning would be questionable as contemplated by Section 5.

2. The project was not one then available, but was new construction.

3. The Attorney General had rendered an opinion that it was unlawful for individuals to use a county drain for sewage disposal as this project was designed for and used (R. 804, 805).

4. The Act provides that a percentage of the costs of construction shall be apportioned to municipalities, such as the City of East Detroit and City of Centerline, and no such apportionment was ever made in the proceedings and plans and specifications, or at any subsequent time (R. 694) (M. R. 159).*

We respectfully submit that the Circuit Court of Appeals properly hold the entire proceedings to be void because the Drain Commissioner was absolutely devoid of jurisdiction in the premises and in so holding properly applied the Michigan Supreme Court decisions and did not, as contended by petitioners, decide an important question of local law in conflict with local statutes and decisions of the State.

---

*M. R. refers to Master's Report.

(b) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS DECISION ON THE EFFECT OF THE RECITALS IN THE BONDS.

Petitioners in briefing the question as to the effect of the bond recitals have completely disregarded three important principles of law which are controlling as to the issue of estoppel in this case:

1. Estoppel does not apply to the appellants who did not sign the bonds or make any representations pertaining thereto.

It is the contention of respondents, other than the Drain Commissioner, that they are not estopped to deny the validity of the bonds because they did not sign the bonds, because they are not parties to the bonds and because they made no representations in respect to the bonds.

The whole theory of estoppel by recitals is that the obligor in the bond made certain statements or representations on the face of the bond which said obligor would be subsequently estopped to deny the truth of as against an innocent holder of said bond for value. The obligor in the bonds sued on is expressly stated to be the drain district only. The County of Macomb or the appellant townships, city or village not being obligors in said bonds nor parties thereto, obviously made no recitals or representations, and hence cannot be estopped.

It is elementary that the doctrine of estoppel arising out of recitals in bonds cannot apply against appellants who are not parties to the bonds.

The United States Supreme Court in the case of *Deery's Lessee v. Cray*, 18 L. Ed. 653, stated:

> "* * * No person can rely upon estoppel growing out of a transaction to which he was not a party nor a privy, and which in no manner touches his rights. There is no mutuality, which is a requisite of all estoppels."

The Michigan Supreme Court has from an early date, as appears from decisions hereinafter cited, held that the Drain Commissioner is not the agent of the municipalities and the county, and there is no authority which can make him the agent of any of the appellants to make representations or to enter into any mutual agreement. In *Township of Cooper v. Little,* 220 Mich. 62, the court said, on Page 64:

> "In a long line of cases beginning with *Dawson v. Township of Aurelius,* 49 Mich. 479, this court has uniformly recognized that the fiscal affairs of a drain were separate and distinct from the general fiscal affairs of the municipality and *that the municipality was not bound or obligated by the acts of the drain commissioner.* Among the cases see *Camp v. Township of Algansee,* 50 Mich. 4; *Wallace v. Sortor,* 52 Mich. 159; *Taylor v. Township of Avon,* 73 Mich. 604; *Hillyer v. Township of Jonesfield,* 114 Mich. 644; *Jenney v. Township of Mussey,* 121 Mich. 229." (Italics ours.)

On Page 65, the Court stated:

> "These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, *nor can the county be so chargeable."* (Italics ours.)

See also *Brooks v. County of Oakland,* 268 Mich. 637, in which case the court made the following statement on Page 639:

"Moreover, the county is not liable for the refund of void drain taxes. The drain commissioner, in establishing the project, and the county treasurer, in taking and handling the assessments, *are not agents of the county* nor are the funds received for the use of the county. The officers perform special statutory duties for drainage districts. The reasons and principles governing township liability under similar statutes and set out in the following cases are applicable: *Taylor v. Township of Avon,* 73 Mich. 604; *Hillyer v. Township of Jonesfield,* 144 Mich. 644; *Brown v. Warner,* 159 Mich. 274. And *Township of Cooper v. Little,* 220 Mich. 62, in which the court, after a review of the authorities, said:

> 'These authorities conclusively establish the law to be that the municipality is not in any way interested in the fiscal affairs of the drain. The township is in no way chargeable with the acts of its officers in the administration of the drain law, nor can the county be so chargeable.'

"Liability of the county is not established by 1 Comp. Laws 1929, section 4937, which provides for payment of principal and interest on bonds out of *general county funds* when the drain fund is insufficient." (Italics ours.)

We submit that under the authorities cited that even if the Drain Commissioner should be held to be estopped to deny the validity of the bonds, the other appellants are not so estopped. The bonds were signed by the Drain Commissioner only and the full faith and credit of the drainage district only is pledged. Appellants other than the Drain Commissioner made no representations in respect to the bonds. The Drain Commissioner is not the agent of appellants other than himself, and they are not bound by his representations or acts. There is no mutuality of contract between the holders of bonds and appel-

lants, who did not sign the bonds or make any representations pertaining thereto. The elementary law under the authorities cited is that to create an estoppel there must be a representation by word or act of the party estopped, which has misled the party asserting the estoppel to his damage, and that the element of mutuality must be present.

The legal and logical conclusion, therefore, is that the appellants other than the Drain Commissioner are not estopped to deny the validity of the bonds.

On this point the Circuit Court of Appeals properly held:

> "The theory of estoppel by recital is that the holder of the instrument is entitled to rely upon the facts recited in the bond. Each of the bonds in question certified that all acts had been done in order to make the bonds a binding obligation of the drain district. No bond makes any recital with reference to its being an obligation of the township or municipality in which the project is situated. Only one set of bonds, that of the Bloomfield Storm Sewer Drain District, recites the statutory obligation of the county to advance funds on the projects. None of the bonds is executed by any township, municipal or county officer, with the exception of the county drain commissioner and the county clerk. Under Michigan law the drain commissioner does not represent any political entity except the drain district, and his representations are in no way binding upon the townships, the municipalities or the counties, for none of these political subdivisions is chargeable either with the acts of the drain commissioner or with the acts of its officers in the administration of the drain law. *Township of Cooper v. Little,* 220 Mich. 62, 64. Moreover, the county is not liable for the refund of void drain taxes, since the drain commissioner does not act for the county in the establishment of the project. *Brooks v. County of Oakland,* 268 Mich. 637, 639.

The county clerk is merely the clerical officer of the county. He has no authority to pledge the faith and credit of the county nor to certify on behalf of the county to facts stated in the bonds. His signature is placed upon the instrument as a certification of the authenticity of the signature of the county drain commissioner.

"We conclude that appellants other than the drain districts are not estopped to defend upon the ground of illegality of the various projects, and that as the proceedings are plainly null and void under Michigan law, the District Court erred (1) in ordering the appellants, municipal township and county officials in all cases, to proceed to assess drain taxes in these projects; (2) in issuing injunctions against such officers, and (3) in ordering the counties to make advancements into the drain district funds."

2. Bondholders are not entitled to rely upon recitals in the bonds where the Drain Commissioner was completely lacking in jurisdiction to issue the bonds or to create any legal liability whatsoever in the undertaking.

In section 2 (b) of petitioners' brief, a considerable amount of space has been devoted to the question of estoppel by recitals. However, it clearly appears that the Drain Commissioner was without jurisdiction and that the proceedings were illegal and void in their inception. In the case of *Township of Lake v. Millar, supra,* where an almost identical project was found and decreed to be illegal, the Michigan Supreme Court stated:

"Defendants contend, and the trial court held, that, plaintiffs not having attacked the regularity of the proceedings here involved by certiorari, are estopped from questioning their regularity in this proceeding.

• • • • •

"The question is presented whether a petition for a drain confers jurisdiction upon the drain commissioner to build a sewer; whether a petition to the drain commissioner to do something within the scope of his authority confers jurisdiction upon him to do something wholly without the scope of his authority; whether a petition to do something he has a right to do confers jurisdiction upon him to do something which he has no right to do; whether upon filing a petition for a drain which he has a right to build, the commissioner may lay out and construct a sewer which he has no right to build? A drain commissioner may not, by mere assumption of authority, legally do that which he has no authority to do. If, upon a petition to do what he has a right to do, he may do what he has no right to do, the extent of his authority is measured by his own acts and conduct and not by law. The extent of the authority of the people's public agents is measured by the statute from which they derive their authority, not by their own acts and assumption of authority. The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari, but AN ENTIRE WANT OF JURISDICTION MAY BE TAKEN ADVANTAGE OF AT ANY TIME. The drain commissioner had no jurisdiction to construct a sewer any more than to construct a Covert road. No one will contend that if the drain commissioner, when the petition for a drain was filed with him, had laid out an assessment district, established and constructed a Covert road, the plaintiffs would have been without remedy. The same legal question is here presented. THE PROCEEDINGS ARE VOID FOR WANT OF JURISDICTION." (Emphasis supplied.)

See also the cases of *Hankinson v. Deake,* 265 Mich. 1; *Kennedy v. Dingman,* 272 Mich. 24; and *Meyering Land Co. v. Spencer,* 273 Mich. 703, where the Michigan Supreme

Court decision on this project has been cited as a precedent for the established law that where the project is illegal, as in the case at bar, the Drain Commissioner was, as stated by the Michigan Supreme Court in *Hankinson v. Deake,* absolutely devoid of jurisdiction in the premises and the entire proceedings were a nullity. It is also important to note that in the case of *Clinton v. Spencer,* 250 Mich. 135, the Michigan Supreme Court held the proceedings to be void from their inception. These Michigan cases clearly stating the law to be that where the Drain Commissioner is without jurisdiction the proceedings are void from their inception, are, of course, binding upon the Federal Courts under the doctrine of *Erie Rd. v. Tompkins, supra; West v. American Telephone and Telegraph Co., supra.*

Having established the fact that the proceedings were void in their inception, it follows that the bonds which were issued as a part of the proceedings are also void. The Michigan courts have repeatedly held that the doctrine of estoppel is not applicable where the projects are illegal because of a total lack of jurisdiction in the Drain Commissioner. It was so held by the Michigan Supreme Court in the case of *Township of Lake v. Millar, supra,* with reference to the question of estoppel against the taxpayers for failure to take certiorari proceedings, and in the case of *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, the Michigan Supreme Court stated:

> "These authorities conclusively settle the law in this State that, property owners assessed for benefits, even though they participate in the improvement and fail to avail themselves of the statutory remedy for review, are not estopped to thereafter attack such proceeding, where the objections raised go to the jurisdiction and involve constitutional rights.

"The general rules of estoppel, as applied to void acts, are thus summarized:

> 'In accord with the general rules already discussed, the rule is laid down broadly in many decisions that a municipal corporation is not estopped to deny the want of power to make a contract by receiving the benefits thereof; and it has even been held that a full performance by the contractor of a contract with a city which is void because opposed to the Constitution and laws and contrary to public policy will not prevent the city from pleading its want of power and the illegality of the contract. If the thing done is illegal or unwarranted by law, however beneficial it may be, the public is not estopped to deny its validity.' *21 C. J.* p. 1214.
>
> 'The doctrine of estoppel cannot be applied against the city to validate a contract which it has no power to make, or which has ceded away, controlled, or embarrassed its legislative or governmental powers. Generally a municipal corporation is not estopped from denying the validity of a contract made by its officers, when there has been a total absence of authority for making such contract. And if the contract is absolutely *ultra vires,* the municipality is not estopped to deny its validity, though the benefits thereof have been received by the municipality.' *10 R. C. L.* pp. 708, 709."

The Circuit Court of Appeals, Sixth Circuit, recognized the applicable rule of law in the case of *Royal Oak Drain District v. Keefe,* 87 Fed. (2d) 786, when it held:

> "The argument is pressed that the structure for the payment of which the bonds were issued was a sewer and not a drain, and so not under the jurisdiction of the drain commissioner under Michigan law. His acts are said to have been mere usurpations, and it is urged he was without power to issue bonds or create any legal liability in the

undertaking. If the premise is sound, the argument is persuasive and based upon unimpeachable authority. *Anthony v. County of Jasper,* 101 U. S. 693, 697; *German Savings Bank v. County of Franklin,* 128 U. S. 526; and many other cases."

The Circuit Court of Appeals in its opinion in this case well stated the applicable rules and cases on the point when it held:

"The decrees in the Meyering Land Co. and Detroit Fire and Marine Ins. Co. cases, *supra,* construing as they do the Michigan county drain law, are binding upon this court. Rulings of state courts construing state statutes were binding upon federal courts prior to the announcement of *Erie Rd. Co. v. Tompkins,* 304 U. S. 64. Certainly since that decision the federal courts are governed by state law to a greater extent than formerly; but the effect of the holding of the District Court in this case is to set at nought the judgment of the state courts that these projects are absolutely void. The bonds do not recite that the various projects have been determined to be drains rather than sewers, and hence the appellants, in seeking to show that they are in fact sewers and illegal, are not seeking to establish any facts inconsistent with the recitals. While in the Michigan cases involving these projects the bondholders were not joined as parties, it is the law of Michigan that where the projects are illegal not from mere procedural deficiency, but from total lack of authority to construct the projects, bonds issued to defray the expense of such projects are void in the hands of innocent holders, and this law we follow. *Erie Rd. Co. v. Tompkins, supra; Ruhlin v. New York Life Ins. Co.,* 304 U. S. 202. The rule that where the issuing officials are completely lacking in power to issue bonds for the particular purpose, *bona fide* purchasers are not entitled to rely upon recitals in the bonds to the effect that the legal and statutory

prerequisites have been complied with, was recognized in *Royal Oak Drain Dist. v. Keefe, supra.* There this court said that if the drain commissioner had no jurisdiction under Michigan law, he was without power to issue bonds or to create any legal liability whatsoever in the undertaking. In this we followed the Michigan decisions. As declared in *Spitzer v. Village of Blanchard,* 82 Mich. 234, 244:

> 'It is not entirely accurate to say that holders of bonds issued by a municipal corporation will be protected as *bona fide* purchasers if the corporation could, under any circumstances, issue the same. This question was considered by the Supreme Court of the United States in *Dixon Co. v. Field,* 111 U. S. 89 (4 Sup. Ct. Rep. 315), where the proper distinction is drawn as to irregularities in the exercise of the power conferred and the total want of power to do the act. Where there is a total want of power, under the law, in the officers or board who issue the bonds, then the bonds will be void in the hands of innocent holders, the distinction being between questions of fact and questions of law. If it is a question of fact, and the board or officers are authorized by law to determine the fact, then their determination is final and conclusive. And although it may be contrary to the fact, yet, if recited in the bond that the necessary and proper steps required by law to be taken had been taken, then the municipality is estopped from denying that they were taken. But it is held that all persons are presumed to know the law, and if the law created conditions precedent upon which the right to act at all depended, and these conditions were not complied with, and the law appointed no board or officer to determine that fact, then there could not be an innocent holder of such bonds. *Bernards Township v. Morrison,* 10 Sup. Ct. Rep. 333.'

"This holding has never been reversed. Hence the test in Michigan as to estoppel raised by recitals in the bonds is whether the officials making the recitals are wholly without power in the premises. If so, no estoppel arises.

"Appellants rely upon certain Michigan decisions which they claim are *contra,* but they are distinguishable in principle. In *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, the villages themselves took part in a false recital, contrary to facts later sought to be asserted. In *Gibbs v. School Dist.,* 88 Mich. 334, there was not a total lack of power in the officials making the recitals, as here, but failure to comply with statutory provisions.

"We are unable, under the Michigan decisions with reference to these drains, to avoid the conclusion that the drain commissioners had no jurisdiction. The holding of the Michigan courts upon this subject is a conclusion of law and binding here. Since the drain commissioners were without jurisdiction, they were totally without power to make recitals binding upon the drain district, and this circumstance is fatal to any claim of estoppel. *First Wisconsin National Bank v. Bessemer Twp.,* 286 Mich. 426; *Spitzer v. Blanchard, supra; Chemical Bank & Trust Co. v. County of Oakland,* 264 Mich. 673. The recital 'that all acts, conditions and things required to be done have been performed as required by law, was a legal conclusion upon which no purchaser was entitled to rely. *First Wisconsin National Bank v. Bessemer Twp., supra.* An examination of the records which the statute required the drain commissioner to maintain (Section 10, c. 2, Act 316, Michigan Public Acts, 1923) would have revealed all the facts necessary for a determination that the project was illegal. A public official who is not empowered to issue bonds cannot create such power by recitals which he may incorporate in the bonds he issues. *Portsmouth Savings Bank v. Ashley,* 91 Mich. 670."

Petitioners have cited numerous cases which are inapplicable because in said cases there was no finding that there was a complete lack of jurisdiction in the parties who issued the bonds. Petitioners have repeatedly refused to recognize the fact that since the Michigan Courts have held that the Drain Commissioner in these cases was without jurisdiction, which holding was concurred in by the Circuit Court of Appeals, and since this Court must follow the Michigan decision the rule stated by the Circuit Court of Appeals, as follows, is clearly applicable, and any other arguments and citations of cases with reference to the effect of recitals in the bonds becomes academic. The Circuit Court of Appeals correctly stated the applicable rule of law in its opinion in this case (R. 654) when it held:

> "Since the Drain Commissioners were without jurisdiction they were totally without power to make recitals binding upon the drain district and this circumstance is fatal to any claim of estoppel."

3. The collection of taxes to pay for the illegal projects would violate the due process clauses of Federal and State Constitutions.

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be * * * deprived of life, liberty or property without due process of law. * * *"

Article II, Section 16 of the Michigan Constitution of 1908 provides as follow:

> "No person shall be * * * deprived of life, liberty or property without due process of law."

The Michigan Supreme Court has, on a number of occasions, held that the levy and collection of a tax to pay

for a void project would constitute the taking of property without due process of law.

> "Here we are not dealing with an irregular exercise of power on the part of the drain commissioner, or, with procedural defects in the proceedings under which the sewers were constructed. The statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances, no estoppel would arise to bar an action to restrain the collection of the void tax."
>
> *Village of Oak Park v. Van Wagoner,* 271 Mich. 450.

> "If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort. • • • Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."
>
> *Fuller v. Cockerill,* 257 Mich. 35.

Article VIII, Section 15-a of the Michigan Constitution of 1908 provides:

> "Drainage District Bonds. Section 15-a. Any drainage district established under provision of law, may issue bonds for drainage purposes within such district."

We respectfully submit that in view of the fact that the Drain Commissioner did not issue bonds for *drainage purposes* in accordance with the Michigan constitutional

provision and that in view of the Michigan decisions quoted above, the Circuit Court of Appeals decided this case in the only way it could have decided it in conformity with the State and Federal Constitutions and the law of the State of Michigan.

(c) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN ITS HOLDING THAT WHERE THE PROCEEDINGS ARE PLAINLY NULL AND VOID UNDER MICHIGAN LAW AND THAT WHEN THE BONDS WHICH ARE A PART OF THE PROCEEDINGS ARE VOID, THE TAX OFFICIALS ARE NOT UNDER A DUTY TO PROCEED TO ASSESS DRAIN TAXES OR TO MAINTAIN DRAIN FUNDS.

Petitioners have sought by the use of one paragraph in the Circuit Court of Appeals' opinion to make it appear that the Circuit Court of Appeals held that regardless of whether the bonds are valid or invalid the tax officials had no power to proceed to assess drain taxes. The Circuit Court of Appeals made no finding on this point one way or the other. The statement referred to by the petitioners (R. 982) was made in the opinion of the Circuit Court of Appeals in which it also held that the bonds were void, and the petitioners' construction of the language used is incorrect and is not what the Circuit Court of Appeals held. However, even if the Circuit Court of Appeals had held what petitioners say it did, there is ample authority for such a holding in the Michigan decisions. In the case of *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, 459, the Michigan Supreme Court held:

> "Here we are not dealing with an irregular exercise of power on the part of the drain commissioner or, with procedural defects in the proceedings under which the sewers were constructed. The

statute did not authorize the construction of either project, or the assessment of the tax. The acts of the drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law. Under such circumstances no estoppel would arise to bar an action to restrain the collection of a void tax."

(d) PETITIONERS' CONTENTION THAT THE COURT OF APPEALS IGNORED THE EFFECT OF THE STATUTE PROHIBITING COLLATERAL ATTACK ON THE DRAIN PROCEEDINGS IS WITHOUT MERIT.

Petitioners admit the rule of law followed by the state court in *Township of Lake v. Millar, supra,* where the court held in passing upon almost identical proceedings:

> "The rule is that errors and irregularities in drain proceedings must be taken advantage of by certiorari but an entire want of jurisdiction may be taken advantage of at any time. • • • The proceedings are void for want of jurisdiction."

The argument now advanced by petitioners has been repeatedly asserted in the state court until it appears that the state court in *Meyering Land Co. v. Spencer,* 273 Mich. 703, now before this court for consideration in a companion case, became somewhat impatient with passing on the so-called usual claim, when it stated on page 709:

> "The usual claim is made that the proceedings must have been attacked by certiorari. This question has been passed upon by this court in *Clinton v. Spencer, supra; Fuller v. Cockerill,* 257 Mich. 35; and *Township of Lake v. Millar, supra.* I can add nothing to what was said in these cases upon the question of the necessity of resorting to certiorari. It is not necessary where there is no jurisdiction."

The Special Master gave full consideration to this provision of the law in his Report (R. 196) where he stated:

> "The Supreme Court of Michigan has held this statute does not apply where the Drain Commissioner has undertaken a project beyond his jurisdiction. *Township of Lake v. Millar, supra,* and other cases."

Petitioners did not file any exception to the last mentioned finding of the Special Master and cannot now raise the question.

The Master correctly found that the doctrine stated in *Douglas v. Pike County,* 101 U. S. 677, was a logical development of the doctrine announced in *Swift v. Tyson,* and that since that case has been overruled "it would seem that the superstructure of law erected on that case should fall with it" (R. 173).

Petitioners' argument is just another instance where they refuse to recognize the doctrine of *Erie Rd. Co. v. Tompkins,* 304 U. S. 694, and subsequent cases, as to the binding effect upon federal courts of state decisions, that except in matters governed by the federal constitution or acts of congress the law to be applied in any case is the law of the state.

Moreover, it must be admitted that it is the rule in Michigan that where the officials acting in the drain proceedings are wholly without authority to act, the proceedings are void and the collection of drain taxes from the appellants would be unconstitutional because it would deprive them of their property without due process of law. The Michigan Supreme Court so held in the case of *Fuller v. Cockerill,* 257 Mich. 35, in which it said:

> "If, as we hold, defendants were wholly without authority to lay this drain, the ultimate result of

> assessment of benefits and the collection from plaintiffs of the drain tax would be to deprive them of their property without due process of any sort. * * * Where the officials acting in the drain proceedings are wholly without jurisdiction or authority to act, the proceeding is void, and equity has power to restrain."

The argument of respondents that the assessment and collection of drain taxes for a project void for lack of jurisdiction in the drain commissioner would violate the constitutional rights of the respondents, has been more fully developed herein on pages 46 to 48.

(c) THE RIGHTS OF APPELLEES, IF ANY, TO THE EXISTING FUND FOR TAXES PAID CANNOT BE DETERMINED UPON THE EXISTING RECORD IN THIS CASE, AND THIS DISPUTED RIGHT MUST BE DETERMINED IN SEPARATE PROCEEDINGS IN WHICH THIS NEW ISSUE IS SUBMITTED AND IN WHICH ALL THE PARTIES IN INTEREST ARE REPRESENTED.

The Circuit Court of Appeals has decreed the Bill of Complaint dismissed. Petitioners, in their petition to the Circuit Court of Appeals for a rehearing, contended for the first time in this case, that the bond redemption fund was derived from taxes paid by taxpayers and that the bondholders are entitled to this fund notwithstanding the illegality of all the proceedings. It does not appear from the record whether these taxes were paid by individual taxpayers or the cities, townships and municipalities, all of whom this Court has held are not estopped to deny the validity of the bonds. There is no statute of limitations in Michigan which provides that the municipalities may not recover taxes paid on an illegal project. Section 4927 of

the Compiled Laws of Michigan for 1929, the statute re ferred to by appellees, is applicable only to individual tax payers and not to the various municipalities. It does no appear what interest the state of Michigan can or woul have in this fund. This fund has been tied up by numerou injunctions, some of which were obtained by petitioners The record does not disclose the number or the time of th issuance of these injunctions. This new contention of ap pellees lacks foundation for determination in these proceed ings because:

(1) Petitioners' counsel in their oral arguments before the lower Court made no reference to this new contention;

(2) Petitioners' briefs before the trial court and upon appeal to the Circuit Court of Appeals contained no reference to this new contention;

(3) Petitioners' Bill of Complaint is absolutely silent in respect to any claim to this fund;

(4) The prayer of Petitioners' Bill of Complaint asks no relief in respect to said fund upon the record as it now stands;

(5) This issue was not raised at the trial and no proofs were introduced to show a right to this fund if the entire proceedings were held void and the lower court held that appellants were not estopped to deny the validity of the bonds.

(6) The findings of the Special Master contain no references to petitioners' right to this fund if the entire proceedings were void;

(7) The findings of the District Court, which confirm the Master's report, make no reference to a right to this fund if the entire proceedings were held void.

In further support of our position that petitioners are not entitled to this fund, we call attention to the following:

(a) Petitioners are wrong in their contention that the fund involved is a trust fund as it was clearly held in *Nuveen v. Quincy,* 156 Southern 153 (Fla.), that a similar fund is not a trust fund. The Nuveen case was decided before the United States Supreme Court decision in the Kersh Lake case which clarified the law as to the Drain Commissioner's representation of bondholders but did not change the law as to such a fund not constituting a trust fund.

(b) Appellees have always contended and it clearly appears from the record (see Exhibits F and G Martin R. 624-638, and specifically 634) that the bonds are part of the proceedings which have been held void.

We respectfully submit that the rights of petitioners, if any, to the existing fund for taxes paid cannot be determined upon the existing record in this case, and this disputed right should be determined in separate proceedings in which this new issue is submitted and in which all the parties in interest are represented.

III.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN THIS CASE IS NOT IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, OR OF THIS COURT

Petitioners state as their third reason for the allowance of the writ that the Circuit Court of Appeals has decided important questions as to the powers of federal courts to restrain actions to enforce judgments of concurrent courts in a way probably in conflict with the decision of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v. Johnson,* 15 Federal (2d) 145, and in conflict with the decision of this court in *Chase National Bank v. City of Norwalk,* 291 U. S. 431. Petitioners say that the Circuit Court of Appeals in this case *apparently* decided an important question in conflict with the Fetzer case and the Chase National Bank case because it failed to restrain by its injunction parties before it in this case from using the state court decrees in a manner inimical to parties who seek relief before them. Petitioners' contention on this point is based upon a false premise. In this case the Circuit Court of Appeals did not decide that if the bonds were for any reason held to be valid that the injunction of the state courts forbidding the collection of taxes could not be overridden. The Circuit Court of Appeals made no finding upon this question one way or the other. There was no necessity for the Circuit Court of Appeals to pass on this question because the Circuit Court of Appeals had found that the proceedings were void, that the doctrine of estoppel by recitals was not applicable, that the bonds were void and that the Bills of Complaint should be dismissed, so it is difficult to understand petitioners' contention when there could be no possible occasion for such a decision by the Circuit Court of Appeals and when in

fact no such decision was made by the Circuit Court of Appeals. Even petitioners evidenced doubt of the correctness of their contention when they stated that "an important question which the Court of Appeals has *apparently* decided in conflict with this court * * *."

Since the Circuit Court of Appeals made no such decision we respectfully submit that this contention of petitioners is not a proper reason for granting certiorari. See the case of *Layne and Bowler Corp. v. Western Well Works,* 261 U. S. 387, 67 L. Ed. 712, in which this Court held that a writ of certiorari granted by this court to settle a conflict between decisions of two Circuit Courts of Appeal will be dismissed as improvidently granted if examination disclosed that there was in fact no conflict between the decisions. Since there is no decision by the Circuit Court of Appeals in this case upon the point raised by petitioners there is no basis for the allowance of the writ.

Even if the Circuit Court of Appeals had held what the petitioners have erroneously assumed that it held, the fact that such a holding conflicted with the holding of the Circuit Court of Appeals (Eighth Circuit) in *Fetzer v. Johnson, supra,* or of this court in the Chase National Bank case would have no controlling effect here because the decision of the Circuit Court of Appeals in this case would have been based on the law of Michigan and the United States Supreme Court will not grant certiorari in a case where the decision of the Circuit Court of Appeals is controlled by state law solely because the decision is in conflict with the decision of other circuits. The decision of this court in *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290, is controlling as to petitioners' contention on this point:

> "As to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

Petitioners have also failed to take into consideration the effect on the Fetzer case of the holding of this Court in the cases of *Erie Railroad v. Tompkins, supra,* and *Ruhlin v. New York Life Insurance Company,* 304 U. S. 202, 82 L. Ed. 1290. If the Eighth Circuit Court of Appeals were to pass on facts in that case at this time there would undoubtedly be a decision to the effect that the decision of the Supreme Court of Oklahoma must be followed.

IV.

PETITIONERS ARE NOT ENTITLED TO HAVE THIS COURT WITHHOLD ITS DECISION IN THIS CASE PENDING THE DECISION OF THE MICHIGAN SUPREME COURT IN THE CASE OF HIGHLAND PARK v. CLARK

The case of the *City of Highland Park v. Clark,* No. 41690 Michigan Supreme Court, is a mandamus action to compel the levy and spread of taxes to pay bonds issued for the construction of a project in a drainage district which is entirely foreign to the bonds, project and drainage district in this case. On the other hand, this is a class suit on behalf of bondholders to determine the validity and force the payment of bonds issued to pay for an entirely different project. In effect, petitioners are asking this Court to withhold action on the application for the writ of certiorari in this case for an indefinite period of time pending the decision of the Michigan Supreme Court in an entirely

different type of action between different parties and involving a different subject matter.

We further wish to point out to this Court that the Michigan Supreme Court in the recent case of *Municipal Investors Association v. City of Birmingham,* 298 Mich. 314, decided June 30, 1941, has decided issues very similar to those now raised in the Highland Park case adversely to the bondholders. In the City of Birmingham case bondholders of a paving assessment district sought a writ of mandamus in the Michigan Supreme Court to compel tax officials of the City of Birmingham to levy a reassessment of paving taxes against the property owners of the district in order to pay special assessment bonds. It appears from the record in that case that the great majority of the lots in the assessment district had been bid in by the State of Michigan because of delinquent taxes and that a large proportion of the lots had been sold at Scavenger Sale under the terms of Act 155 of the Public Acts of Michigan of 1937, as amended. Section 9 of said Act provides:

> "Any quit claim deed or deeds executed by the board shall convey title in fee to land vested in the board under the provisions of this Act free from any encumbrances. * * *"

The Michigan Supreme Court denied the writ of mandamus on the following grounds:

1. Because the City of Birmingham has no power or authority to levy a special assessment against the land while it is owned by the State of Michigan. This holding was based on the theory that a municipality which is a creature of the state cannot tax the state in the absence of legislation permitting such a tax. There is no such legislation permitting such a tax.

2. Because under the provisions of section 9 of Act I of the Public Acts of Michigan of 1937, quoted above, wh the property was sold at "scavenger sale" the purchas took title free and clear of any encumbrances or liens wh soever. The Michigan Supreme Court further held th when purchasers take free and clear of all liens and asse ments the municipalities cannot make a reassessment pay for an old improvement. The court stated:

> "It should be borne in mind that when the lots question were sold for delinquencies, upon failu to redeem, the title vested absolutely in the sta with power to dispose of them in any way not co trary to the constitution. Upon resale by the Sta Land Office Board, a new chain of title originate evidenced by a quit claim deed, 'free of any encu brances.'"

The same reasoning applied by the Michigan Supren Court in the City of Birmingham case applies to the issu raised in the City of Highland Park case and to the fac in this case because the bondholders here seek to comp the Board of Supervisors and the Drain Commissione who are respondents in this case, to levy and collect a assessment to pay for the project here under consider tion. This Court will take judicial notice of the fact th in Michigan during the years of the depression subseque to 1929 a very large proportion of taxable property becan tax delinquent for failure to pay the usual property tax and was eventually bid in by the state and title becan absolute in the State of Michigan. The records for th various municipalities in the Nine Mile-Halfway Drai District show that in excess of seventy percent (70% of the property in the district was purchased at tax sal by the State of Michigan, and that the large majority the said property was subsequently sold at "Scaveng Sale." The above figures are a matter of public record an can easily be verified by petitioners.

We respectfully submit, therefore, that this Court cannot give the bondholders the relief which they seek and still follow the local rule of law established by the Michigan Supreme Court decision in the City of Birmingham case which held that the tax officials cannot be forced to levy and collect taxes or special assessments when title to the great percentage of the property in the assessment district has become absolute in the state or has been purged of all liens and assessments by being sold at "Scavenger Sale."

It appears from the figures stated above as to the percentage of tax-delinquent properties that the taxpayers rather than the real estate operators and the bondholders were the parties most injured by the speculative activities which led to the construction of projects such as the one now before this Court.

Even if this Court were to disregard the law of the case, which this Court cannot do under the authorities, and consider only the equities, it is to be noted that these projects were promotional schemes by real estate subdividers, eager bond salesmen and persons other than the county, the cities and the municipalities upon whom it is now sought to place the burden of paying for the same. We quote, in part, from the opinion of Judge Toms, the visiting Circuit Judge, who not only tried the very similar *Township of Lake v. Millar* case in the lower Michigan court but made a personal examination of the project:

> "The Nine Mile-Halfway Drain is not a drain as contemplated by law, but is in fact a *sewer,* the building of which in territories such as this can have no justification either legal or economic. * * *.
>
> "*The pouring of public money by the million in a district of this character for public improvements which would more than adequately serve an area with ten times the present population constitutes the*

grossest squandering of public funds which, if it is not, should be criminal.'' (Emphasis supplied.)

In this case the judgment of the Circuit Court of Appeals was entered on March 14, 1941. The Petition for Rehearing was filed on April 9, 1941, and denied May 9, 1941. Soon after the date of denial of said Petition for Rehearing, to-wit, June 5, 1941, the Petition for the writ of mandamus was filed with the Michigan Supreme Court in the Highland Park case. An Answer was filed thereto on June 10, 1941, and on June 12, 1941, the Michigan Supreme Court entered its order to the defendants to show cause why the writ should not issue. The same parties who are the petitioners in this cause appear by the same counsel as relators in the mandamus proceedings in the Michigan Supreme Court. Thus petitioners after years of attempting to avoid the effect of the Michigan decision with reference to this project, and after having deliberately sought the jurisdiction of the Federal Courts, and after years of proceedings in these cases in the Federal Courts, are now seeking within one month after the adverse decision in the Circuit Court of Appeals, to shift back to the Michigan courts. Since the State Court has already ruled upon the invalidity of the very proceedings now before this Court and has enjoined the collection of taxes to pay for this project, we respectfully submit that this Court should not withhold its denial of the Writ of Certiorari in this case pending the decision of the Michigan Supreme Court in the City of Highland Park case.

CONCLUSION

The first reason advanced by petitioners for granting the writ of certiorari is based upon an alleged violation of the due process clause of the Federal Constitution by the decision of the Circuit Court of Appeals. We have shown that the decision which petitioners seek to review did not deprive petitioners of their rights to due process and that in reality all that petitioners are seeking is a rehearing of matters adjudicated by the court below. Petitioners admit that the second reason advanced is not a proper reason for the granting of the Writ because it deals only with the application of local law by the Federal Court. We have fully answered this second contention and shown substantial evidence to support the decision of the Circuit Court of Appeals. The third reason is based upon a claimed apparent conflict between the decisions of the Circuit Court of Appeals of the Sixth and Eighth Circuits and is not a proper reason because the Circuit Court of Appeals in this case did not make the decision that petitioners claim it did, and even if it be assumed that the court below made a decision in conflict with another Circuit the decision made was based on local law and is proper, because conflicts between Circuits are inevitable if the Federal Courts are to follow the law of the numerous states, and such conflicts are now permitted under the rule announced by this Court in *Ruhlin v. N. Y. Life Ins. Co., supra.*

It clearly appears from the records and the arguments of petitioners and respondents that petitioners have had their claims and rights finally adjudicated in both the federal and state court.

(a) The bondholders had their full day in court in these proceedings in which they were parties plaintiff, and the Special Master and the District Court made an independent finding of the illegality of the proceedings, which

finding was concurred in by the Circuit Court of Appeal in its independent determination that "the proceeding are plainly null and void under Michigan law" and respon dents are not estopped to deny the validity of the bonds The judgment of the Circuit Court of Appeals, which con forms to the law of the state, finally determines the right and claims of petitioners.

(b) The Circuit Court of Appeals in deciding the loca issues properly found in substance that even if it had no made an independent determination of the illegality o the proceedings and the bonds under Michigan law, th bondholders had their day in court in the Township o Erin case where the state court found and decreed th entire proceedings illegal and void for want of jurisdictio in the Drain Commissioner to do what he attempted to do because under the state and federal authorities cited th Drain Commissioner represented the bondholders in sai state court proceedings.

Petitioners have either failed or refused to recogniz that this Court in the Erie Railroad case overruled th doctrine of *Swift v. Tyson*, and we suggest that cases simi lar to the one at bar were the fundamental reason for th overruling of that doctrine.

The Circuit Court of Appeals in its well considered opin ion clearly resolved purely local issues in favor of re spondents.

We respectfully submit that there is no merit to peti tioners' contentions and the writ sought should be denied

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,

BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents

FILED
NOV 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners,
Penobscot Building,
Detroit, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI

The above petitioners hereby respectfully petition the Court to grant a rehearing on the petition for certiorari heretofore denied October 13, 1941, for the following reasons:

1. The decision of the Court of Appeals, Sixth Circuit, entitled *Bloomfield Village Drain District, et al., v. Keefe, et al.*, 119 F. (2) 157, conflicts with local law in the particu-

lars set forth in paragraph 2 of the reasons relied upon for allowance of writ in the petition for certiorari.

2. The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, which decision will be conclusive as to the applicable principles of law governing this case, and this Court should await such decision.

This motion is based upon the records and files herein and accompanying brief.

Counsel for petitioners hereby certify that this petition is presented in good faith and not for delay.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The accompanying motion is confined to those points which have to do with local law and on which federal courts cannot exercise an independent judgment. The petition for certiorari in paragraph 2 of the reasons relied upon for allowance of the writ sets forth the particulars on which petitioners believe that the Court of Appeals came to a conclusion opposed to local law. Briefly these points of conflict are: (a) holding the improvement is illegal under Michigan law, (b) holding that the bond recitals do not protect *bona fide* holders of the bonds against the claims of illegal action by the drain district and drain commissioner, (c) holding that estoppel of the drain district to plead illegality does not establish the duty of officers and others to provide funds for bond payments, (d) ignoring the point that under the drain law and interpretations in effect when the bonds were issued collateral attack was barred, and (e) ignoring the point that money collected and on hand for distribution to bondholders should be distributed irrespective of the validity or non-validity of the bonds.

By prior proceedings herein, and particularly by petitioners' motion to enlarge the time for filing a petition for rehearing, this court was advised that a case will soon be decided by the Supreme Court of Michigan in which points a, b, c and d are involved. We refer to *City of Highland Park, et al. v. Clark, et al.*, which has now been orally argued, and in which briefs have been filed. The opinion of the Michigan Supreme Court can now be expected within a few days or weeks.

While no one, except the Michigan Court, knows what the decision in the City of Highland Park case will be, we believe it must definitely declare the law of Michigan as to the kind of a drainage improvement the drain commissioner was authorized under the Michigan Drain Law to build, and even if it is decided that the drainage improvement there involved, which is similar to those involved in this and companion cases, was an illegal sewer rather than a drain, it must still decide whether the bonds are enforceable on the principle of estoppel.

The Court of Appeals' decision is based upon its conception of Michigan law. It in effect assumes that the Michigan court of last resort would be required to decide the case as it decided it. Within a very short time we will know whether this assumption is correct. Respondents in this case must recognize that the forthcoming opinion of the Michigan Court must either confirm what the Court of Appeals has decided, or flatly contradict it, for they have filed briefs *amici curiae* urging that the Court of Appeals' opinion ought to be followed.

The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae*, it will end this case. As no money or property is withheld from respondents they will have suffered no loss as a result of the brief period of time during which the matter remains undecided. On the other hand, holders of these bonds will suffer great and irreparable loss if the Michigan Court should flatly disagree with the Court of Appeals and hold that it has wrongly construed local law, and the decree of the latter court stands without an opportunity to review. It will then mean that bondholders' rights have been judged by a conception of law proven to be erroneous.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

FEB 23 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,

BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

This Honorable Court, in passing upon the pending petition for rehearing, may now grant the request of counsel for petitioners and give consideration to the case of the *City of Highland Park, et al., v. Earl L. Clark, Drain Commissioner of Oakland County, et al.* The Michigan Supreme Court decided the Highland Park case on February 11th, 1942, and a copy of the State Court's decision is attached hereto as Exhibit "A." This recent

case is referred to in the brief in support of the petition for rehearing as follows:

> "While no one, except the Michigan Court, knows what the decision in the City of Highland Park case will be, we believe it must definitely declare the law of Michigan as to the kind of a drainage improvement the drain commissioner was authorized under the Michigan Drain Law to build, and even if it is decided that the drainage improvement there involved, which is similar to those involved in this and companion cases, was an illegal sewer rather than a drain, it must still decide whether the bonds are enforceable on the principle of estoppel."
>
> * * *
>
> "The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae, IT WILL END THIS CASE.*" (Emphasis supplied.)

In opposing counsel's reasons for a rehearing they set forth:

> "The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, which decision *WILL BE CONCLUSIVE* as to the applicable principles of law governing this case, and this Court should await such decision." (Emphasis supplied.)

The history of the Highland Park state case disclosing how a suit pending in the Federal Court with all pleadings filed and issues involved similar to the drain cases upon which this Court denied certiorari was dismissed and the Highland Park case started in the State court appears in our brief on file in the companion Nine Mile Drain case, this Court Docket No. 291, one of the five related cases (this Court Docket Nos. 287-291). It now appears that peti-

tioners' attempts to convince the Supreme Court of the State that it should repudiate the State Court holdings upon which the United States Circuit Court of Appeals grounded its decision in the drain cases have failed. The State Court, in the Highland Park case, adhered to its well established precedents followed by the Circuit Court of Appeals and in addition thereto cited with approval the case at bar and all the companion drain cases now before this Court on petition for rehearing after certiorari has been denied. This is all summed up in the last two sentences of the State Court's opinion as follows:

> "*We repeat* that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. *Kennedy v. Dingman*, 272 Mich. 24. The Federal courts likewise recognize the Michigan rule, *here repeated*, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. *Bloomfield Village Drain District v. Keefe*, and four other cases,* (U. S. Circuit Court of Appeals (6th Circuit), March 14, 1941), 119 Fed. (2d) 157." (Emphasis supplied.)

It now clearly appears that the only substance to the petition for rehearing was a request by petitioners to withhold passing upon the petition for rehearing while petitioners' counsel attempted to have the State Court change the law of the state.

---

*This reference is to the *Keefe v. Bloomfield Village Drain District*, *Keefe v. Nine Mile Drain District*, *Keefe v. Martin Drain District*, and *Keefe v. Center Line Drain District*, the same cases upon which certiorari has been denied and now before this Honorable Court on petition for rehearing.

The Highland Park case confirms our contention that there is no merit to the petition for rehearing. We respectfully submit that the petition for rehearing should be denied.

ALEX. J. GROESBECK,
1801 Dime Bank Building,
Detroit, Michigan,

BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

EXHIBIT A

CITY OF HIGHLAND PARK, a municipal corporation, NATHAN SIMONS and SEYMOUR SIMONS, Testamentary Trustees of the Estate of D. W. Simons, Deceased, KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING,
Relators,

v.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents.

No. 41,609.

Before the entire bench.

BUSHNELL, J. Relators, who claim to be bona fide holders for value of bonds issued by Royal Oak No. 7 Storm Sewer Drain District in the Township of Royal Oak, Oakland County, Michigan, seek a writ of mandamus directing and commanding respondents, the drain commissioner of Oakland county and the board of supervisors of that county, to severally and collectively perform such acts as will result in the levy, certification and spread of all unpaid portions of the installments of taxes levied for this drain, and such supplemental or deficiency assessment as shall be sufficient to pay all outstanding bonds of the district. We issued an order to show cause and it was stipulated between the parties that the answer of the drain commissioner and the board of supervisors should stand as the return to that order.

The proceedings to establish this drainage district were instituted on June 3, 1927, under Act No. 316, Pub. Acts 1923, (1 Comp. Laws 1929, Sec. 4836 et seq. [Stat. Ann. Sec. 11.1 et seq.]) which only authorize the construction of drains. This act has been since amended (Act No. 318, Pub. Acts 1929, and others) and now includes provisions for the building of sewers and sewage facilities in connection with drains. The proceedings progressed in the usual manner and bonds in the par amount of $191,000 were issued. The entire issue was purchased by a brokerage house in the City of Detroit and payment therefor was made to the county treasurer. The bonds were resold to various investors and these relators now hold 150 bonds of the outstanding issue.

The construction was of an underground type, of vitrified, double strength sewer crock, with catch basins for surface waters and Ys for sanitary sewer connections to each residential lot, capable of caring for sanitary sewage and surface waters of the whole area of the district. The underground conduits range from 12 to 54 inches in diameter.

The bonds have been in default since May 1, 1931, due to the suspension of the levy of installments of the assessment for this project during the years 1932 to 1936, inclusive. All bonds are now past due and interest has been in default since May 1, 1940. On December 12, 1940, relators entered into written agreement with the drain commissioner, board of auditors, and treasurer of the county, whereby 30 per cent of the accrued interest was cancelled and refunding bonds were to be issued. Relators surrendered their interest coupons, consented to an indorsement on their bonds of a receipt for all interest to May 1, 1940, and were paid 70 per cent of the accrued interest. Respondent drain commissioner then

sought authority for the issuance of refunding bonds and, on February 13, 1941, the Michigan Public Debt Commission signed an order authorizing such an issue. Relators were later informed by respondents that they would neither issue such refunding bonds nor levy any further taxes for the payment of existing bonds. The answer of respondents avers in substance that the refunding agreement, having been executed without the authority or approval of the board of supervisors, is void and of no force and effect, and that, because of the holding of this court in Village of Oak Park v. Van Wagoner, 271 Mich. 450, decided May 17, 1935, the bonds held by relators are void.

In the 12 briefs that have been filed in this cause by the parties and various amici curiae, to whom leave was granted, it is conceded that decision in this case affects not only the possibility of payment of the defaulted bonds of this issue, but many millions of other outstanding drain bonds.

The issues presented may be summarized as follows:

1. Is the decision in Village of Oak Park v. Van Wagoner, 271 Mich. 450, either res adjudicata or stare decisis?

2. Are respondents estopped by the recitals in the bonds?

3. May the validity of the drainage proceedings be attacked in a collateral suit?

4. Is Royal Oak No. 7 Storm Sewer Drain a sewer or a drain?

5. Is mandamus the appropriate remedy?

Litigation regarding the validity of drainage projects has been determined by this court in various cases, among

which are the following: Clinton v. Spencer, 250 Mich. 135; Warren v. Township of Engelbrecht, 251 Mich. 608; Kinner v. Spencer, 257 Mich. 142; Township of Lake v. Millar, 257 Mich. 135; Hankinson v. Deake, 265 Mich. 1; Village of Clawson v. Van Wagoner, 268 Mich. 148; Village of Oak Park v. Van Wagoner, 271 Mich. 450; Kennedy v. Dingman, 272 Mich. 24; Meyering Land Co. v. Spencer, 273 Mich. 703; Detroit Fire & Marine Ins. Co. v. Oakland County, 284 Mich. 130; Detroit Trust Co. v. Dingman, 291 Mich 170.

In none of the above cases were bondholders actual parties, although respondents argue that bondholders were represented by the drain commissioner. Holders of bonds issued on projects covered by some of the foregoing cases have litigated their claims in the Federal courts. The most recent Federal decision is Bloomfield Drain District v. Keefe, 119 Fed. (2d) 157. Other Federal cases are an unreported one before Judge Raymond in the Western District of Michigan and Royal Oak Drain District v. Keefe, 87 Fed. (2d) 786.

No useful purpose would be served in reviewing the cited cases, each of which has been re-examined as to its applicability to the issues presented. Careful consideration requires the conclusion that decision in the instant case is governed by the reasoning in Village of Oak Park v. Van Wagoner, 271 Mich. 450. Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, "The acts of the

drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law." We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof.

The project was designated "Royal Oak No. 7 Storm *Sewer* Drain," and the bonds bore the heading, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." It was recited in the bonds "that all acts, conditions and things required to be done, precedent to and in the issuance of this bond in order to make it a binding obligation of the Royal Oak No. 7 Storm *Sewer* Drain District have been done * * * and for the prompt payment hereof * * * the full faith, credit and resources of said Drain District are hereby irrevocably pledged." The underground conduits are all of the same size and character as when they were laid and are serving the same purpose for which they were laid. If the levy of a tax in 1935 "would constitute the taking of property without due process of law," the levying of a tax now would also constitute the taking of property without due process of law.

We do not say that the Village of Oak Park case, supra, is res adjudicata of the rights of these relator bondholders nor do we hold that they had their day in court, through representation by the drain commissioner who was the defendant in that action. We do say, however, that the rule of stare decisis should be applied even though equitable considerations might prompt a different result. Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 35. See, also People v. Droste, 160 Mich. 66, 75, and Colborne v. Detroit United Railway,

177 Mich. 139, 142. Since we held in 1935 that it was illegal to levy and collect any tax assessed as a result of this project, under the doctrine of stare decisis we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project.

It is urged that respondents are estopped by the recitals in the bonds to deny their validity. Generally speaking, a municipal corporation cannot be estopped by the unauthorized and illegal acts of its officers. Certainly the board of supervisors of Oakland county cannot be estopped by the drain commissioner of that county because he had no legal authority whatever to speak for them and the counter signature of the county clerk was merely a ministerial act.

Is the drain district estopped by the recitals of the drain commissioner? Among the authorities cited in support of relators' contention, the case of Thompson v. Village of Mecosta, 127 Mich. 522, is typical. In that case the Village of Mecosta had authority to issue public improvements bonds and, so far as the bonds issued were concerned, they were perfectly good on their face. There was nothing to challenge the attention of the purchaser, such as the title of the proceedings and the heading of the bonds in the instant case. They were designated only as public improvement bonds of the Village. The bonds were, however, "delivered to the Hutchinson Manufacturing Company of Jackson, Mich., as a bonus or aid to parties erecting a gristmill," a purpose for which the village wholly lacked authority to issue bonds, namely, a private improvement. The bonds upon their face "unquestionably carried a false pretense." This court held that—

> "a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act, for lawful purposes; i. e., public improvements." Citing authorities.

Judgment, however, for plaintiff was reversed and one entered for the Village because of the absence of proof of bona fides.

In the instant case there is no showing, and can be no showing, of false pretense. Each obligation now in question bore title, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." The drain commissioner had no authority to build a *sewer* drain. He was wholly without jurisdiction and his void acts cannot estop the drain district, even though it can be argued that the taxpayers of the drain district have profited by his unauthorized acts.

Since relators do not present a case warranting the relief asked for, we need not pass upon the propriety of mandamus as a remedy in this action.

The writ of mandamus is denied. A public question being involved, no costs will be allowed.

Boyles, J. I concur on the ground that no facts are adduced in this case outside of those before us in Village of Oak Park v. Van Wagoner, 271 Mich. 450. This record shows that every step in the proceeding resulting in the issuance of these bonds, from the original application for laying out the drainage district to issuing the bonds thereon, refers to a *Storm Sewer Drain.* At the oral argument and in numerous briefs filed by amici curiae, it is urged that the validity of at least eleven other bond issues involving several millions of dollars depends upon the decision in this case. The validity of such issues depends upon the facts and circumstances under which

they were issued. See Royal Oak Drain District, Oakland County, Mich. v. Keefe (U. S. Circuit Court of Appeals [6th Circuit], January 14, 1937), 87 Fed. (2d) 786. We repeat that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. Kennedy v. Dingman, 272 Mich. 24. The Federal courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. Bloomfield Village Drain District v. Keefe, and four other cases, (U. S. Circuit Court of Appeals [6th Circuit], March 14, 1941), 119 Fed. (2d) 157.

Chandler, CJ., and North, Starr, Wiest, Butzel, and Sharpe, JJ., concurred with Boyles, J.

Bushnell, J. I agree with the amplification as stated by Mr. Justice Boyles.

Office - Supreme Court, U. S.
FILED
FEB 28 1942

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Penobscot Building,
Detroit, Michigan,
Counsel for Petitioners.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit

SUBJECT INDEX

	Page
1. Action by this court should be deferred until it is known that the opinion as filed by the Supreme Court of Michigan in City of Highland Park v. Clark is final and official	2
2. Even if the State Court's opinion remains in substantially the same form as the one on file, it demonstrates the truth of petitioners' contention that the lower court erred in determining local law	3
(a) State Court disagrees with lower court in reference to prior decree being *res judicata*	3
(b) It disagrees with lower court in reference to Thompson v. Village of Mecosta, 122 Mich. 522 being applicable	4
(c) It disagrees with lower court in reference to construction of bond recitals	5

INDEX OF AUTHORITIES

City Company v. Stern & Chase Securities Co. v. Vogel, 312 U. S. 823	2
Pomeroy v. National City Co. (Minn.), 296 N. W. 513	2
Royal Oak Drain District v. Keefe, 87 Fed. (2) 786	4
Schmid v. Village of Frankfort, 131 Mich. 197	4
Thompson v. Village of Mecosta, 127 Mich. 522	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITIONERS' REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

Answering the brief as above entitled, we urge the following:

1. ACTION BY THIS COURT SHOULD BE DEFERRED UNTIL IT IS KNOWN THAT THE OPINION AS FILED BY THE SUPREME COURT OF MICHIGAN, IN CITY OF HIGHLAND PARK v. CLARK, IS FINAL AND OFFICIAL.

(a) We know from information contained in letters copied in the appendix to this brief that the opinion is not as the court wishes it, and that the copy included in respondent's brief is incorrect. We are told that the copy filed indicates that the opinion of Mr. Justice Bushnell was signed by all of the justices, which puts a different complexion on the interpretation to be applied. We are also informed of changes Mr. Justice Bushnell has requested the official reporter to make.

(b) A motion for rehearing has been filed, a copy of which appears in an appendix, which may result either in a different conclusion or a different opinion. This court, in previous cases where it has awaited the decision of a state court for an expression of local law, has deferred action on the petitions for certiorari until the state court had acted upon a petition for rehearing. See *City Company v. Stern,* and *Chase Securities Corp. v. Vogel,* 312 U. S. 666, 61 S. Ct. 823; and *Pomeroy v. National City Co.* (Minn.), 296 N. W. 513. The motion for rehearing addressed to the state court will point out the error by that court in assuming that a storm sewer is not a drainage facility. The record in this case demonstrates this factual error. See Master's report, R. p. 110. If the state court is convinced of this error, it will in all probability change its opinion.

2. EVEN IF THE STATE COURT'S OPINION REMAINS IN SUBSTANTIALLY THE SAME FORM AS THE ONE ON FILE, IT DEMONSTRATES THE TRUTH OF PETITIONERS' CONTENTION THAT THE LOWER COURT ERRED IN DETERMINING LOCAL LAW.

(a) An essential and necessary step in the lower court's reasoning was that a decree in *Township of Erin v. County of Macomb,* rendered by a circuit judge, was *res judicata,* although bondholders were not before the court in which the decree was rendered. The lower court said (R. 654): "The officers of the drain district represented all creditors of the district, including the bondholders, in the state court cases, and thus appellants (appellees) had notice and were given their day in court in those cases." Because of this, the lower court said later: "Those cases are *res judicata* of the determinative facts of this controversy." It will be remembered that the decree referred to in this case (R. 23) contains no statement that the project is not a drain, and no opinion appears with the decree. This statement of the lower court as to representation by the drain commissioner is flatly contradicted by the Michigan court. It says (see p. 9 of Respondents' Brief): "We do not say that the *Village of Oak Park* case, *supra,* is *res adjudicata* of the rights of these relator bondholders, nor do we hold that they had their day in court, through representation of the drain commissioner, who was the defendant in that action." While it says that the *Oak Park* case, which involved the same improvement, is a precedent which it should follow, that reasoning could not be applied here. The Martin Drain and Branches Drain never was adjudicated to be anything other than a drain by any state tribunal. The only finding on the subject was that of the Master in this case. It was, therefore, the duty of the

lower court to consider the facts concerning this structure and decide whether the evidence supports the conclusion that this structure was not a drain under Michigan law. It is only because of a peculiar conception of an agency existing between bondholders and drain district officers, now held unwarranted, that the lower court deemed it unnecessary to consider the sufficiency of the evidence under which the district court reached the conclusion of illegality. Had not this erroneous view been entertained, it would have been necessary to consider this evidence and pass upon the question of its sufficiency, and we believe the lower court would have done so. It did this in *Royal Oak Drain District v. Keefe,* 87 Fed. (2) 786.

(b) The lower court rejected the authority of *Thompson v. Village of Mecosta,* 127 Mich. 522, and *Schmid v. Village of Frankfort,* 131 Mich. 197, saying that "the villages themselves took part in the false recital" (R. 654). The Michigan Supreme Court, however, accepts these cases as authorities which would rule the decision in all cases involving drain bonds, *bona fide* held, where the bonds themselves contained no notice of infirmity. It held that the Royal Oak No. 7 Storm Sewer Drain District bonds contained this notice of infirmity because of the title of the improvement. It must necessarily follow from this that had the words "storm sewer" been omitted from this title, the decision would be the other way. It emphasized by quotation from the *Thompson* case, the following: "A *bona fide* purchaser for value had a right to rely upon the statement of the board, appearing on the bond, that it was issued to borrow money under this act, for lawful purposes, *i. e.,* public improvements" (See p. 11 Respondents' Brief). In this case the title of the proceedings and bonds, and all references therein, indicated that the improvement contemplated would be a drain (R. 21, 624). These bonds carried on their face a false pre-

tense, in that they certified that the money was to be spent to build a drain, and that all acts, conditions, etc. existed and had been performed to make them binding obligations.

(c) Recognition of the authority of *Thompson v. Mecosta (supra),* and other Michigan cases of like import, and the authorities cited therein, necessarily controverts the lower court's theory that the recitals in these bonds did not have such form as to make them inconsistent with the claim that the improvement was not to be a drain. In the *Thompson* case, the recital was merely compliance with the governing law. Hence the bonds not only recite compliance, but add the further statement of the due happening, existence and performance of all acts and events essential to their validity.

It cannot be doubted that had the lower court known the views of the Michigan Court of last resort, as expressed in this opinion, it would have eliminated from its opinion its determination that a decree in a prior suit was *res judicata,* that a drain district's bonds with recitals such as these do not carry a false pretense, and that such bonds would not estop the district to assert that the improvement built with their proceeds was not a drain. With these propositions eliminated, we believe it logical to infer that the lower court would have affirmed the district court's decree.

We submit that the opinion of the state court demonstrates vital errors by the lower court in its assumption that local law required it to reverse the district court in this case. Local law, in its application to drain bonds and the facts in this case, is now known, or will be as soon as this opinion of the Michigan court becomes final and official. Therefore, the petition for rehearing and petition for certiorari should be granted, and the case reversed and

remanded to the lower court, with directions to decide the case in accordance with the now known principal of local law.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

APPENDIX

February 13, 1942.

Honorable George E. Bushnell,
Dime Bank Building,
Detroit, Michigan.

Dear Judge Bushnell:

There are several inaccuracies in your opinion in *City of Highland Park v. Clark,* which you might wish to correct before the opinion becomes official.

1. The quotation from the opinion in *Village of Oak Park v. Van Wagoner,* reading "The acts of the drain commissioner were without warrant in law," etc., which the opinion says was unanimously concurred in, does not appear in the majority opinion appearing at the bottom of page 459 of 271 Mich., but is part of the Circuit Judge's opinion approved by the minority.

2. At the end of the paragraph in which *Thompson v. Mecosta* is considered, the opinion says: "Judgment, however, for plaintiff was reversed and one entered for the Village because of the absence of proof of *bona fides.*" The opinion in the case, 127 Mich. 522, 530, shows that a new trial was ordered. By reason of the fact that the original taker of the bonds participated in the fraud, it was incumbent on plaintiff to show good faith. The court was of the opinion that the evidence on this subject should be taken and ordered a new trial for that purpose. The erroneous statement in regard to this case might carry the inference that you considered the decision on the main point obiter.

3. I wonder whether it was understood that the amendments to the drain code included in Act 365, Public Acts 1925, and Act 331, Public Acts 1927, were applicable. The second paragraph of your opinion only mentions Act 316, Public Acts 1923. One sentence of this paragraph says, "This act has been since amended (Act No. 318, Public Acts 1929 and others) and now includes provision for the building of sewers and *sewage facilities.*" I have underscored sewage facilities because the provision for building a sewage disposal plant was in the 1925 amendment, and applicable to these proceedings. Thus there was in the law at the time some provision for sewage facilities.

Very truly yours,

IL:GLD (Signed) Irvin Long.

February 17, 1942.

Mr. Hiram C. Bond,
Supreme Court,
Lansing, Michigan.

Dear Mr. Bond:

In re City of Highland Park v. Clark
(Mot. 23, Oct. Term 1941)

I enclose a letter received from Mr. Irvin Long of Detroit.

I do not agree with the view he expresses in paragraph 1 because, as I read the opinion from which he quoted, the court did unanimously agree with the quoted statement. He is not correct in his observation in paragraph 2 and I would like to have the opinion corrected by the

substituted of some words in the sentence which Mr. Long quotes so that it will read:

> "Judgment, however, for plaintiff was reversed and a new trial ordered because of the absence of proofs of *bona fides.*"

This will require the deletion of the words "one entered for the village."

I do not share his apprehension as expressed in paragraph 3 of his letter, but for the sake of clarity it might be wise to delete the word "now" from the quoted sentence.

I am sending a copy of this letter to Mr. Long so that he may see what action has been taken.

I assume you will secure the permission of the other members of the court in order to authorize these changes.

Sincerely yours,

(Signed) George E. Bushnell.

February 18, 1942.

Mr. Jay Mertz,
Clerk of Supreme Court,
Lansing, Michigan.

Dear Jay:

Re: City of Highland Park v. Clark
Motion 23, October Term

I have been having some difficulty in interpreting the two opinions in the above case, and asked Judge Fead if he could help me.

What I want to know is whether the entire court agreed with all Justice Bushnell said in his opinion, and merely

thought it should be amplified by the opinion of Justice Boyles, or whether Justice Bushnell's opinion represents views held independently. Judge Fead was also in doubt. I believe he had some conversation with Justice Bushnell which gave him the impression that both opinions represent the views of the court. Judge Fead suggested that I write you, asking that you look at the opinions as filed and signed, and advise whether Justice Bushnell's opinion is also signed by other members of the court. All that appears on the copies sent me is, first, Bushnell's opinion, then Boyles' opinion, followed by

> "Chandler, C. J. and North, Starr, Weist, Butzel and Sharpe, J.J. concurred with Boyles, J.
> "Bushnell, J. I agree with the amplification as stated by Mr. Justice Boyles."

The use of the term "amplification" puzzles us, because it implies merely an addition of something left unsaid in the first opinion.

Would you be so good as to look at the original on file and see whether by any chance the copy omitted signatures of other judges to Bushnell's opinion.

Very truly yours,

IL:GLD (Signed) Irvin Long.

All the Justices signed Justice Bushnell's opinion. Judge Boyles' opinion was signed as above.

(Signed) J. M.

STATE OF MICHIGAN

SUPREME COURT

CITY OF HIGHLAND PARK, a municipal corporation, NATHAN SIMONS and SEYMOUR SIMONS, Testamentary Trustees of the Estate of D. W. Simons, Deceased, KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, Relators, v. EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY, Respondents.	No. 41,690.

MOTION FOR REHEARING

Now come relators and move the court to grant a rehearing in the above entitled cause for the following reasons:

1. The court attached erroneous significance to the fact that the proceedings and bonds denominated the improvement a storm sewer drain, which could only have resulted from a misconception of the meaning of the term "storm sewer," which is a purely land drainage facility.

2. The court erroneously concluded that it was bound by *Village of Oak Park v. Van Wagoner,* 271 Mich. 450, it being clear from the opinion in that case and the

record on which it came to this court, that the point involved in this court was not whether the method of construction of the improvement caused it to be outside the drain commissioner's jurisdiction, but whether with that fact assumed, the Village could attack collaterally the legality of taxes against it.

3. The court failed to consider the vital difference between the issue raised in *Village of Oak Park v. Van Wagoner (supra)* and this case, the former being an issue between a taxpayer and taxing officers. In such issue no consideration was given to the rights of bondholders, since they were not parties to the case, and the facts presented to the court were insufficient to show their rights.

4. The court, under the *stare decisis* rule, should have applied the reasoning in *Hankinson v. Deake,* 265 Mich. 1, *Village of Clawson v. Van Wagoner,* 268 Mich. 148, *Kennedy v. Dingman,* 272 Mich. 24, and *Detroit Trust Co. v. Dingman,* 291 Mich. 170, to this case, all of which hold that an improvement built as the one here involved is a legal drain, and within the drain commissioner's jurisdiction.

5. The court, in the opinions herein, appears to erroneously interpret accepted rules of long standing, and previously held in this state, whereby a municipality is estopped as against *bona fide* holders of its bonds to deny the truth of recitals therein.

6. The opinions fail to deal with the proposition adequately presented by relators that collateral attack upon the legality of the improvement and taxes therefor is barred by the statute, with its interpretations prevailing when the bonds were issued, and that relators are entitled to have the same interpretation apply now, notwithstanding intervening contrary interpretations.

This motion is based upon the record in this case, the briefs previously filed, and the attached brief. We certify that it is not presented for purposes of delay, but to obtain a decision honestly believed to be just and in accordance with the laws.

EARL B. YOUNG,
Attorney for City of Highland Park.
LEVIN, LEVIN, GARVETT & DILL,
Attorneys for D. W. Simons Estate.
VOORHIES, LONG, RYAN & McNAIR,
DYKEMA, JONES & WHEAT,
Attorneys for Kenneth M. Keefe, et al.

THOMSON, WOOD & HOFFMAN,
Of Counsel.

BRIEF IN SUPPORT OF MOTION FOR REHEARING

We earnestly request the court to grant a rehearing, in order that certain erroneous conceptions disclosed by the two opinions in this case can be corrected. The importance of the case is such that these ought not to go unchallenged. Because of the inadequate time permitted for oral argument, we were unable to fully present the issues, and believe that numerous points may not be fully understood. We believe that an oral argument which would permit full discussion would bring about a result more in accordance with the rights of the parties.

As this court knows, this is but one of many controversies of a similar nature, and what this court says probably will affect the final outcome of *Bloomfield Village Drain District v. Keefe,* 119 Fed. (2) 157, which still remains unsettled. The Supreme Court of the United States has held petitions for reconsideration of its order denying certiorari for about three months, undoubtedly because it feels that it should not decide a question of local law of so much importance until this case is decided. We foresee perplexity both by that court and lower courts in this state which will have similar cases before them, to know whether emphasis on the term "storm sewer drain" is vital. This is only one of a few cases where that term is used. Does the decision mean that if the title of the improvement was merely Royal Oak No. 7 Drain, the *bona fide* holder would be protected? It is peculiarly important in the matter before the United States Supreme Court because five

issues of bonds are there involved, only one of them using the term "storm sewer drain." We respectfully urge the desirability of clarifying this point.

I.

SIGNIFICANCE OF TERM "STORM SEWER DRAIN" USED IN THE PROCEEDINGS AND BONDS

One opinion underscores the word "*sewer,*" the other "*storm sewer drain,*" and from this we draw the inference, and we believe others will do the same, that the court believes there was something indicative of wrongdoing on the part of the drain commissioner in planning to build an improvement which in his judgment warranted the name of "storm sewer drain." As the respondents made no claim that there was special significance to these words, and the briefs contain no argument on the subject, we feel that the court could not have been aware of the fact which we trust we can make clear, that the words "storm sewer" have an effect entirely opposite to that which the court has inferred. We hope that careful thought will convince the court that a storm sewer is purely a drainage device, carrying the implication that it is intended for storm water only, and not for sanitary sewage, and thus the name carries the implication that the improvement is to perform only that function which farm ditches are appropriate to perform, but to perform it in a more appropriate and efficient manner.

Confirmation of this point appears in the fact that this court approved the legality and complete jurisdictional compliance of another improvement, the East Clawson *Storm Sewer Drain,* in *Village of Clawson v. Van Wagoner,* 268 Mich. 148. Although the opinion does not show

the name of the improvement there under consideration, the name appears again and again in the records and briefs and the court, when it decided the case, must have known it. In the record of that case (p. 44) appears the explanation of the then commissioner, Governor Van Wagoner, whose competency as an engineer must be conceded. The record there says:

> "Murray D. Van Wagoner, drain commissioner at the time of the trial, is a graduate of the University of Michigan Engineering Department. The plaintiff conceded that he was a qualified sanitary engineer. He defined storm sewer as a sewer built for the purpose of carrying off from the ground, roofs and pavements, storm water, together with some underground water."

The common use of the term "sewer" to describe any underground passage or channel built in the form of a conduit to carry off unwanted water, is recognized in *Kennedy v. Dingman,* 272 Mich. 24, wherein the court said that the use of the term "sewer" by engineers in speaking of the project there under consideration had no significance. What did govern the court's opinion was the actual purpose of the thing. Was it built with the dominating purpose of ridding the land of water, or to enable residents to rid themselves of domestic sewage? The presumption of legality applicable to all official acts required the court, as was said in both the above decisions and others, to uphold the validity of drain proceedings until it was shown that the improvement was primarily a sanitary sewer.

So in every case which has come before this court touching on this question, since *Hankinson v. Deake,* 265 Mich. 1, there has been recognition that removal of storm water is the function of a drain, and that merely

constructing it in conduit form instead of an open ditch is of no consequence. The same was conceded at the hearing by counsel for *amici curiae.* When it is in a conduit form and is intended only for storm water removal, it necessarily is a storm sewer, as that term is commonly understood.

In the last previous case to come before the court, *Detroit Trust Co. v. Dingman,* 291 Mich. 170, this court said:

> "It is a well known fact that as land is developed for residential purposes, streets of an improved character are a necessity, and these cannot be preserved except special drainage is provided to care for surface water. It is equally well known that not infrequently this type of drainage is cared for by structures of an entirely different character than drains used to improve agricultural lands. Not infrequently drains designed to carry off volumes of surface water incidental to storms and melting snow are constructed with closed joints and laid deep in the ground, as in the instant case. This, however, does not deprive the structure of its character as a drain."

By "structures of an entirely different character than drains used to improve agricultural lands," the court could only have meant enclosed conduits, with inlets, catch basins, etc. for taking in surface water,—*i. e.* a storm sewer.

Dictionaries and standard engineering treatises confirm what the court said in *Kennedy v. Dingman,* that the word "sewer" alone is of no significance.

The Century Dictionary defines sewer as a "conduit or channel constructed, especially in a town or city, to carry off superfluous water, soil or other matter, a public drain." In *Bouvier Law Dictionary* it is defined

as a "subterranean passage for drainage, usually constructed and maintained by a municipal corporation." To an engineer, sewers are of three kinds,—sanitary, combined and storm. The court has said that it is not the function of the drain commissioner to provide sanitary sewers; that he may build combined sewers if the purpose is predominantly the removal of storm water. It could not very well say that he could not build a storm sewer, as that would deny him the very purpose of his office, the duty of providing for land drainage. In engineering texts we find the following:

In *Folwell—"Sewage,"* 10th Ed., p. 1: "In some cases house sewage is removed in one set of sewers and storm water in another set, the former being called *sanitary sewers* and the latter *storm sewers* or *drains.*" In *Hardenburgh—"Sewerage and Sewage Treatment,"* 1st Ed., p. 3: "A sewer that carries only storm water, drainage and other water from the surface of the street, but not domestic sewage or industrial wastes, is commonly known as a *storm sewer.* Such a conduit is often called a drain, but the term drain is preferably applied to a pipe in which both underground water and surface water are carried off by gravity."

All counsel in this case on both sides understood the meaning of these terms. They had the opportunity of examining numerous engineering witnesses in the various suits which resulted in the Circuit Court of Appeals opinion in *Bloomfield Village Drain District v. Keefe,* 119 Fed. (2) 157. The Master's report in the cases involving the Macomb County Drains, basing his opinion on a considerable amount of engineering testimony, says:

> "Considerable testimony was introduced as to the engineering principles and terminology underlying the construction of sewers and drains, a

knowledge of which is essential to the determination of the primary character of these projects. Fundamentally, a sewer differs from a drain in that the latter is designed to remove the surface and subsoil waters from a given area, while the purpose of the latter is to remove household and industrial wastes, including the effluent from laundry, bathtubs, washbowls, kitchen sinks, and toilets. The term 'drain' is sometimes used by engineers in the restricted sense of meaning a conduit designed to remove subsurface water only, for agricultural purposes, by infiltration. Before the development of modern plumbing in the latter part of the last century, the term 'sewer' had the same connotation which is now given to 'drain,' and is today frequently used by both engineers and laymen to embrace both meanings. There is a general tendency to refer loosely to any underground conduit as a sewer. The term 'storm sewer' has a definite technical connotation among engineers of meaning a conduit in an urban or semi-urban community designed to remove surface and subsurface waters only. The term 'combined sewer' refers to a conduit designed to receive both drainage and sewage. A 'sanitary' or 'separate' sewer is a conduit designed to receive sewage only. In urbanized communities, where underground systems for removing both classes of material are now the rule, engineering practice has varied between the construction of separate and combined systems, and there is a difference of opinion among engineers as to which is the generally preferable type."

No criticism of this statement was made in the case by any of the parties.

Therefore, we say, with all confidence, that anyone reading the proceedings, and anyone reading the bonds, instead of being charged with knowledge that the project

was to serve primarily the householders' need of an outlet for sanitary sewage, would be assured that all that was intended was a device to draw off and transport storm water, excluding therefrom all household sewage. Nowhere in the papers upon which the commissioner's jurisdiction is invoked, nor in his orders and determinations, can anyone find the slightest indication of an intent to make it other than a drainage project. Certainly nothing in the bonds tells a purchaser that sanitary sewage would ever be carried in it. Though this is permissible to some extent, as the court has said, the bonds, by using the term "storm sewer," carried the information that only storm water removal was the purpose of the work.

II.

EFFECT OF THE DECISION IN VILLAGE OF OAK PARK v. VAN WAGONER, 271 MICH. 450

The court feels that it is bound by its opinion in *Village of Oak Park v. Van Wagoner* to say that this project was outside the jurisdiction of the drain commissioner. A superficial reading of the opinion in that case might indicate that such was the court's decision, but we earnestly contend that this is not so, because the question presented to this court did not call upon it to pass upon that point.

It is true that in the lower court a decree could not be granted for the Village without proving to the satisfaction of the court that the project was not a drain. Circuit Judge Gillespie heard the case before *Hankinson v. Deake,* 265 Mich. 1 was decided. His only guides on the subject were decisions relating to the Southfield Storm Sewer and the Nile Mile Halfway Drain. He com-

pared the form of this drain to that of those improvements, and held it resembled them. In his decree he made the finding that this was a sanitary sewer (see appendix to our first brief, p. 65), although it is clear now that it was not. The circuit judges who decided *Hankinson v. Deake (supra)* and *Village of Clawson v. Van Wagoner,* 268 Mich. 148, followed the same reasoning, and were reversed.

If one supposes that the question of the legality of the improvement was before this court, it must strike anyone reading the opinion as peculiar that this court made no mention of its previous decisions in *Hankinson v. Deake* and *Village of Clawson v. Van Wagoner.* One would expect a discussion of points of contrast and an explanation of why a different conclusion was reached, since they had been decided but a short time previous.

The answer to the question as to why these decisions were not considered is in the fact that appellant, in bringing the Oak Park case to this court, did not challenge the finding of Judge Gillespie that the improvement was a sanitary sewer. On pages 4 and 5 of Relators' Reply to Brief of *Amici Curiae,* we print in full the assignments of error and questions appellants' brief raises. Nowhere is there complaint that the lower court erred in making the finding. All that is presented as a ground of error is that notwithstanding the construction of an unauthorized project, plaintiff was in no position to object, being barred by laches, acquiescence and failure to resort to certiorari.

The court's rules governing the appeal in this case quite definitely restricted the questions before the court to those covered by the assignments of error (preferably called grounds of appeal), and questions listed at the

beginning of appellants' brief. The rule then in effect was No. 59 (1931 Revision of the Rules), in which Section 3(d) provided for statement of grounds of appeal, saying:

> "Such reasons or grounds may be stated in the form heretofore employed in assignments of error, but no statement shall be deemed insufficient if it reasonably informs the opposite parties as to the nature of the error which appellant relies upon. If any of appellant's grounds involve the objection that the verdict, finding, judgment or decree is in any respect unsupported by the evidence, he shall specifically point out the part or feature of the case wherein the insufficiency is found. No other grounds or reasons shall be considered on the appeal except those so stated."

In a note to this rule contained in the publication thereof, entitled Michigan Court Rules Annotated, Professor Sunderland, Chairman of the Commission which formulated the rules, said:

> "Equity appeals are often called trials *de novo* on the record, but they are not such in fact. They are rather reviews of cases already tried, and they are disposed of by the supreme court in the light of the decisions below. The avowed purpose of the appellant is to establish the incorrectness of the decree, in whole or in part, and the appellee necessarily attempts to sustain its correctness. If the appeal is treated as a true review of the case upon the record, as to the law and the facts, the scope of the hearing in the supreme court will be restricted to such matters as the appellant really complains of, instead of involving everything in the case, whether the appellant complains of it or not.
>
> "Many states by statute require the same specifications of grounds in equity cases as in cases at

> law, and the practical need for it is exactly the same in both classes of cases. The burden upon the reviewing court will be definitely limited by such a practice, and the parties will be restricted from the beginning to those aspects or phases of the case which are called into question."

Rule 69 also contained the direction that appellant should preface his brief by a statement of the questions involved, and said that no point would be considered "which is not set forth in or necessarily suggested by the statement of questions involved." This case was presented to this court under a stipulation designed to take the place of the judge's certificate appearing on page 211 of the record, that the "record as prepared and presented contains all the evidence, either in substance or extended form, received upon the *issues pertinent to grounds of appeal filed herein.*" (Italics ours.)

Appellant did not specifically point out, as the rule required, that Judge Gillespie's finding was in any respect unsupported by the evidence; hence appellant could not argue error in this regard. Had such argument been made, appellee could have rightfully objected to its consideration, for it cannot be presumed that the record contained evidence on questions not raised by the grounds of appeal,—the stipulation indicating that not all evidence before the lower court was included. We cannot imagine that this court would have ignored its own rules and passed on a question not before it, when the record in the case disclosed that only those matters pertinent to the assignments of error were brought up. It ought to be presumed that this court abides by its own rules.

Decisions are not binding authorities as precedents upon propositions which should have been, but which

were not, considered. *Moinet v. Burnham Stoepel & Co.*, 143 Mich. 489.

This court, in the Oak Park case, did not pretend to pass upon the question whether Judge Gillespie correctly held that this project was a sanitary sewer, and could not under its rules have done so. It merely assumed that it was what the circuit judge found it to be, which the appellant did not question, and proceeded to a consideration of the questions appellant expressly raised.

It is superficial to regard a case as a precedent merely because it happened to involve the same improvement, unless it appears that the same question was presented. Precedents should be sought in cases where the same question was presented and the facts are similar, though other improvements were involved. Contrary to what has been said in the opinions, we believe that it would serve an extremely useful purpose to compare the facts in this structure, as disclosed in the opinions, with those in *Detroit Trust Co. v. Dingman,* 291 Mich. 170, the last previous case involving the question. It is right and just that the parties, the legal profession, and lower courts should be told why different conclusions are reached. The law governing both projects was the same. Both were underground conduits, capable of caring for both storm water and sanitary sewage. The presumption of legality attached to both. Why is the one in which the purpose of sanitary sewage removal played such an important factor that it was deemed necessary to build a sewage treatment plant, an improvement primarily for storm water removal, while the other, wherein such plant was deemed unnecessary, is primarily a sanitary sewer? If this was not a drain, what should the commissioner have done or left undone to bring it within his jurisdiction?

In all there have been so far ten cases since 1930 in which drain assessments were challenged on the ground that the project was a sewer, not a drain. In only four out of the ten was the circuit judge affirmed. Some thirty or more of these underground drainage projects have never been before this court. What rule have we which will enable a circuit judge to say that the primary purpose of each is drainage or sanitation? Must each be brought before this court before it can be known whether assessments and bonds are enforceable?

III.

ESTOPPEL BY BOND RECITALS. EFFECT OF THOMPSON v. VILLAGE OF MECOSTA, 127 MICH. 522, AND SIMILAR AUTHORITIES

Although the Oak Park case and this grow out of the same improvement, we respectfully submit that the controversy is different and the facts are different. A suit by a taxpayer to cancel his taxes is vastly different from a suit by a bondholder to secure what was promised him. The terms of the bonds, and the fact that they are *bona fide* held, were not before the court in the other action. The fact that a different issue is involved, and different facts applicable, was clearly recognized by this court in *Kinner v. Spencer,* 257 Mich. 142, where the court, though holding assessments void, refused to enjoin payments of the bonds because bondholders were not parties. This refusal necessarily was based upon the knowledge that irrespective of the court's conclusion of invalidity of taxes, on the record before it, bondholders might have rights based upon facts which they might be able to prove, or presumptions which they might call to their aid. It is as illogical to say that there is no difference between a taxpayer's suit and a bondholder's suit

as to say that there is no difference between a suit on a promissory note between the original parties and one between an endorsee and the maker. The fact of good faith holding makes a world of difference.

The two opinions make it obscure as to whether there is agreement in the court that *Thompson v. Village of Mecosta,* 127 Mich. 522, *Common Council v. Schlich,* 81 Mich. 405, *Schmid v. Village of Frankfort,* 131 Mich. 197, and *Bates v. City of Hastings,* 145 Mich. 574, are still the law, although the absence of any criticism of these decisions suggests that they are still considered sound expressions of the law, but that the court deems that they are inapplicable because the bonds refer to a "storm sewer drain." What has been before said in this brief as to the significance of this term seems to us to completely dispel the impression that this term was a badge of invalidity. Rather, it should be said that it emphasized the assurance of validity. Bondholders were assured by the state constitution of the power of the drain district to issue bonds for drainage purposes within the district. Certainly there was nothing in the constitution or drain law to indicate that drainage by means of a storm sewer was not permissible. The natural implication would be that any structure providing a water course for drainage purposes came within the scope of the commissioner's powers.

The broad statement contained in Judge Boyles' opinion that "a drain district or municipality is not estopped from denying liability of a bond issue on the ground of total lack of jurisdiction," is something that will interminably plague the court unless it is clarified. It all depends upon what is meant by total lack of jurisdiction. If it means absence of power to spend the proceeds in the manner intended at the time the bonds were issued, it is incorrect, so long as *Thompson v. Village of Me-*

costa and the three other cases cited with it, stand as the law. If it means absence of power by the municipality or drain district under all circumstances to issue bonds, it is correct but inapplicable to this case. There will be more cases coming before this court where some municipality claims the identical proposition claimed here, that it issued its bonds with the intent of spending the proceeds for some *ultra vires* purpose, and this statement, along with the other statement in the same opinion that "the validity of such issues depends upon the facts and circumstances under which they were issued" will be urged as authority for disregarding the effect of bond recitals.

We have cited many pertinent authorities to the effect that the first alternative meaning, the only one which could apply to these facts, is untenable. To emphasize it, we quote from a well reasoned case, *Caldwell v. Guardian Trust Co.*, 26 Fed. (2) 218, cited p. 22 of our first brief, in which bonds of an Arkansas drainage district were held valid, notwithstanding the fact that the drainage district only had authority to provide ditches and could not provide "sewers," as had been done. Without investigating the validity of the objection, the court held that the defense was precluded by bond recitals similar to those contained in these bonds. Quoting from an earlier case, it said:

> "Under the Constitution of the United States and the Constitution and Statutes of Arkansas, this road district and its officers had plenary authority to have obviated every one of the objections now under consideration, to have made the assessment, the levy of taxes, and all proceedings legal and valid, to have made its certificate in its bonds and mortgage true. It obtained the money of Otis & Company on this certificate that it had

> done so, and neither it nor the owners of the property in its district assessed, which it represented in its sale of these bonds, can now be permitted to defeat this suit of the purchasers by such defects in their proceedings as are now under consideration, on the ground that they made them illegal or invalid and their certificate false."

Total lack of power which can be successfully urged as a defense against municipal bonds *bona fide* held, and containing recitals such as these, is only that absence of power which results from no valid law under which the bonds of the municipality could under any circumstances be issued. All are expected to know the law; hence recitals of the existence of a law which, in fact, is nonexistent, are ineffective, but recitals of a state of facts which only those in control of the proceedings can know is a different matter.

We again call the court's attention to that well recognized authority cited p. 19 of our reply brief, *Hughes County v. Livingston,* 104 Fed. 306, wherein the court, in speaking of the rule forbidding denial of the truth of recitals, says:

> "If the legal effect of recitals is merely to declare that a state of facts or circumstances existed under which the municipality had the power to issue the bonds, this is a just and reasonable rule, and it is and it ought to be uniformly applied and enforced, because such facts are peculiarly within the knowledge of the municipality and its officers, and without the knowledge of the purchasers of the bonds. On the other hand, if the laws are such that there can be no facts or circumstances under which the municipality could have the power to issue the bonds, the purchasers are charged with knowledge of this state of the law."

In this case the respondents do not and cannot claim anything other than that there were peculiar facts and circumstances which made the exercise of the power to issue these bonds illegal. The peculiar fact claimed is that the project was not a drain because it was primarily intended as a sanitary sewer. Intention was a fact peculiarly within the knowledge of the district and its officers. The only information bond purchasers could have was that obtainable from the district and its officers. The bonds gave them the information. They could rely on it as truthful, and were not obliged to investigate further.

IV.

FAILURE OF OPINIONS TO DEAL WITH PROPOSITION THAT THE CERTIORARI PROVISION SHOULD BE GIVEN THE SAME CONSTRUCTION NOW AS EXISTED WHEN THE BONDS WERE ISSUED

We think that a decision in a case of so great importance ought to make known the court's opinion on every well considered point which would lead to an opposite conclusion. No one can deny that the drain law contained a provision which on its face forbade an attack upon the legality of the improvement constructed, and the taxes levied therefor, and that this had uniformly been interpreted by this court up to the time of the issuance of these bonds as forbidding collateral attack, whether such attack was grounded upon defects called irregularities or want of jurisdiction. *Stare decisis* was relied upon by bond purchasers. They believed that the court would adhere to the same interpretation, and if not, would apply the rule that an *ex post facto* change of interpretation could not affect their rights. The authorities are cited on pages 55, *et seq.* of our first brief, page

26 *et seq.* of the reply brief, and page 16 of the reply to brief of *amici curiae*. If the court is disposed to distinguish this case from *Township of Clarence v. Dickinson*, 151 Mich. 270, on the ground that due process would be violated by levying a tax by a drain commissioner for an improvement which it considers is primarily a sanitary sewer, is not an explanation in order to connect the due process clause with the situation? How is due process of law violated where a tribunal having power to take some action involving a deprivation of property, after notice and a fair hearing, strictly perform all conditions as to notice and fairness of hearing? Is it violated because the tribunal, after such notice and with the tacit consent of all concerned, takes some action which in strict law it should not have taken? If so, is not every judgment of a court open to the charge of invalidity on proof that the result reached was erroneous? We submit these questions deserve an answer.

CONCLUSION

We appreciate the fact that the court is reluctant to grant rehearings, because the time it can devote to any case is limited, but this is an unusual case. Oral argument which would have permitted the threshing out of the problems and a free discussion was sharply limited by court rule. People who innocently invested their money in bonds issued by a public agency are made to lose $150,000.00 and interest, and the agency is given a valuable and greatly needed improvement free of cost. If it is right and just that this result should occur, clear and well founded reasons should be given. Furthermore, the questions in this case are bound to recur again and again. Holders of other bonds of drain districts

cannot be expected to fold their hands and charge their investments to profit and loss. Drain commissioners are now encouraged to dispute every right of bondholders to the levy of taxes for the construction of any project which in any way resembles this one, and it may be expected that they will do so, for their interest lies in satisfying their constituents. A flood of litigation, with its attendant costs and disappointments, can be avoided if the court will recall its opinions, rehear the parties, and write a new opinion giving adequate and consistent reasons for the position taken. We believe if this is done, the court will be forced to a conclusion opposite to that which it has here given.

Respectfully submitted,

EARL B. YOUNG,
Attorney for City of Highland Park.
VOORHIES, LONG, RYAN & McNAIR,
DYKEMA, JONES & WHEAT,
Attorneys for Kenneth M. Keefe, et al.
LEVIN, LEVIN, GARVETT & DILL,
Attorneys for Estate of David W. Simons.
Attorneys for Relators.

THOMSON, WOOD & HOFFMAN,
Of Counsel.